111-722

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 254.

JANE C. HITZ, APPELLANT,

vs.

THE NATIONAL METROPOLITAN BANK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 4, 1884.

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1 *Authentication of Record.*

CLERK'S OFFICE, SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Clerk's Certificate.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings (partly written and partly printed) annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause, and are included within pages numbered from 1 to 137, inclusive.

Witness my hand and the seal of said court, this 1st day of June, 1881.

[SEAL.] R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 1st day of June, 1881.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 1st day of June, 1881.

[SEAL.] R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

1½ Supreme Court of the District of Columbia. In Equity. No. 6,822.

THE NATIONAL METROPOLITAN BANK OF Washington, Complainant,
vs.
JOHN HITZ, JANE C. HITZ, WILLIAM G. Metzerott, and Samuel Cross, Defendants.

To the Honorable the Justice of the Supreme Court of the District of Columbia, holding a Special Term in Equity.

The bill of complaint of the National Metropolitan Bank of Washington respectfully represents:

First. That the complainant, the National Metropolitan Bank of Washington, is a body corporate, incorporated and doing business in the city of Washington, District of Columbia, under and by virtue of the laws of the United States, which provide for the formation of banking associations, and brings this suit in its own right.

Second. That the defendants, John Hitz, Jane C. Hitz, William G. Metzerott, and Samuel Cross, are residents of the District of Columbia; that the said John Hitz and Jane C. Hitz are sued in their own right, and the said William G. Metzerott and Samuel Cross are sued as being parties named in a certain paper writing hereinafter referred to.

Third. That heretofore, to wit, on the 28th day of April, in the year 1879, the complainant obtained, on the law side of this honorable court, a judgment, in case No. 20,351 at law, against
2 the defendant John Hitz for the sum of ten thousand dollars, with interest on the same at the rate of seven per cent. per annum from October 14, 1878, until paid, the cost of protest, $1.85, and the costs of suit, $25.

That on the 5th day of June, 1879, a writ of *fieri facias* was duly and regularly issued on said judgment, directed to the Marshal of the United States for the District of Columbia; that the said writ was on the same day duly returned by said marshal *nulla bona*, as appears from a short copy of said judgment and said return filed herewith, and which it is prayed may be taken and considered as a part of this bill, being marked "N. M. B. Exhibit No. 1;" that said judgment is still in full force and effect, and has not in any manner been reversed, paid, or satisfied in whole or in part; and that the complainant does not know of any personal property upon which execution of its said judgment may be levied and its said debt and costs satisfied.

Fourth. That the complainant is informed and believes, and therefore charges, that the said Jane C. Hitz is the lawful wife of the said John Hitz; that the said Jane C. Hitz and John Hitz were lawfully married on the day of ,18 ; that the said Jane C. Hitz and John Hitz have had and have lawful issue of said marriage born alive and possibly capable of inheriting the estate of the said Jane C. Hitz; that during their coverture the said Jane C. Hitz has been and is the owner of, and has been and is seized in possession in fee simple of, the lands and tenements situate and being in the City of Washington, in the District of Columbia, described as follows:

Original lots one (1) and twenty (20) in square numbered one hundred and forty-three (143), and that part of original lot two (2) in the same square described as follows: Beginning for the same at the southeast corner of said lot, running thence north along the east line of said lot seventy-six feet (76 ft.), thence west five feet (5 ft.), thence south seventy-six feet (76 ft.), thence east five feet (5 ft.) to the place of beginning.

Also original lot number four (4) in square number three hun-

dred and seventy-nine (379); also that part of lot numbered eleven (11) in square numbered four hundred and three (403), bounded as follows: Beginning for the same at Eighth street at the dividing line of lot "ten" (10) and said lot "eleven" (11), and running thence south along the line of Eighth street forty feet (40 ft.),
3 thence at right angles with said street ninety-nine feet (99 ft.) four inches (4 in.) to the rear of said lot, thence along the rear of the same north forty feet (40 ft.), and thence along the dividing line aforesaid east to the beginning; together with the improvements and appurtenances to all said premises belonging or appertaining.

Fifth. That by reason of the premises the said John Hitz hath a life estate in said lands and tenements herein last describe during the joint lives of himself and his wife, and by reason thereof is entitled to have, collect, and receive all the rents, issues, and profits of said estate and of said lands and tenements; that the said estate of the said John Hitz is subject to execution at law.

Sixth. That the said Jane C. Hitz so being the owner of and seized in possession in fee simple, and the said John Hitz having said estate in said lands and premises by deed dated the 9th day of December, 1878, and received for record in the office of the register of deeds for the District of Columbia on the 13th day of May, 1879, and recorded in Liber 913, folio 437, one of the land records for the District of Columbia, conveyed to the said William G. Metzerott and Samuel Cross the said original lots numbered one (1) and twenty (20) in square numbered one hundred and forty-three (143), and that part of original lot two (2) in the same square hereinbefore more particularly described, being that part of said lot formerly owned by Michael Shanks, late of the city of Washington; and also original lot number (4) in square three hundred and seventy-nine (379), and also that part of lot numbered eleven (11) in square numbered (403) hereinbefore more particularly described; together with all the improvements, rights, ways, easements, privileges, and appurtenances unto the same belonging or in anywise appertaining, in trust for the sole, separate, and exclusive use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband and from any liability for his debts, and to permit her to have the possession, use, and income of said premises, and further to lease, sell, mortgage, convey, and otherwise dispose of such premises or any part thereof in such manner and for such interests and estates as she may direct and appoint by her instrument of writing under her hand and seal, and attested by two witnesses, and whether such direction and
4 appointment be of a testamentary character, to go into effect after her death in the absence of any such direction and appointment, or subject thereto, to hold the said premises for the use of the children of said Jane C. Hitz living at the time of her death, and the children of any deceased children, so that the latter shall

take the same share in said property which their parents would take if living, their heirs and assigns forever, as will more fully appear on reference to said conveyance to the said William G. Metzerott and Samuel Cross, a duly authenticated copy of the same being filed herewith, which it is prayed may be read and considered as a part of this bill, being marked "N. M. B. Exhibit No. 2."

Seventh. That the complainant is informed and believes, and so charges, that the said conveyance was made by the said John Hitz and Jane C. Hitz voluntarily and without consideration, and with intent to hinder, delay, and defraud the complainant and other creditors of the said John Hitz, and has hindered and delayed the complainant in the collection of its said debt.

Eighth. That the complainant, on the 6th day of June, 1879, caused another execution to issue upon and in respect of said judgment, and to be placed in the hands of the marshal of the United States for the District of Columbia, and the said marshal has levied on the said lands and tenements, hereinbefore described, and on the said estate and interest of the said John Hitz therein, whereby the complainant has acquired a specific lien upon said property, interest, and estate; but that the obstruction interposed by said conveyance prevents and will prevent a sale of said property and of the interest and estate therein of the said John Hitz at a fair valuation and for what the same is reasonably worth.

Ninth. That the complainant is informed and believes, and therefore charges, that the said trusts have never been accepted by the said defendants, William G. Metzerott and Samuel Cross, or either of them, and that the said conveyance has never been executed and delivered or accepted by the grantees therein, but that said conveyance was placed in the hands of the said defendant, William G. Metzerott, to be held by him in escrow until certain transactions between the said John Hitz and the German-American Bank should be closed up, and that said conveyance was obtained by the said Jane C. Hitz of the said William G. Metzerott merely for safe-keeping, and was improperly and fraudulently filed for record with the recorder of deeds for the District of Columbia by the said Jane C. Hitz without the knowledge, privity, or consent of said William G. Metzerott and Samuel Cross, or either of them, the conditions on which said conveyance was to have been delivered and recorded never having happened or been complied with; all of which will more fully appear from the caveat and instrument of writing filed by the said William G. Metzerott and Samuel Cross in the office of the recorder of deeds for the District of Columbia, a duly authenticated copy of said caveat being filed herewith and marked "N. M. B. Exhibit No. 3;" and it is prayed that the same may be read and considered as a part of this bill of complaint.

Tenth. That the complainant is informed and believes, and so charges, that for the reasons aforesaid the said conveyance is fraudu-

lent and void as against the complainant, and ought to be removed out of its way, in order that the complainant, by a sale under the execution aforesaid, may obtain a full price for the estate and interest of the said John Hitz in the premises aforesaid, so levied on as aforesaid.

Eleventh. That until the sale of said estate and interest of the said John Hitz in said land and premises is made, the complainant is entitled to have the rents, issues, and profits payable in respect of said premises collected and held subject to the further order of the court, as otherwise they will be wasted and utterly lost to the complainant.

Whereupon, as the complainant is remediless at law, it prays as follows:

1st. That the defendants, by their answers under oath, may disclose what was the real and true consideration and purpose for the making of said conveyance.

2d. That said conveyance may be set aside and declared null and void as to the complainant.

3d. That a receiver may be appointed to collect the rents, issues, and profits of and pertaining to said premises, and hold the same subject to the further order of the court.

4th. That the writ of subpœna may be issued, directed to the defendants, commanding them to appear and answer the exigencies of this bill.

6 Fifth. That the complainant may have such other and further relief as the nature of the case may require, and as to the court may seem right.

[SEAL.] GEO. H. B. WHITE, *Cashier.*

NATH'L WILSON,
Sol'r for Compl't.

The defendants to this bill are John Hitz, Jane C. Hitz, Wm. G. Metzerott, and Samuel Cross.

George H. B. White, being first duly sworn, deposes and says that he is the cashier of the National Metropolitan Bank of Washington, the complainant in the foregoing bill; that he has read the foregoing bill by him subscribed, and knows the contents thereof; that the facts therein stated of his own knowledge are true, and those stated on information derived from others he believes to be true. GEO. H. B. WHITE, *Cashier.*

Sworn and subscribed to before me this 7th day of June, A. D. 1879.

[SEAL.] WM. G. MOORE, *Notary Public.*

Endorsed: No. 6822. In equity. The National Metropolitan Bank of Washington vs. John Hitz et al. Creditors' bill in aid of

a levy. Clerk will please file. N. Wilson. Filed June 9, 1879. R. J. Meigs, clerk.

7 *A. M. B. Exhibit No. 1 with Bill. Short Copy.*

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ ET AL. } No. 20,351. Docket.

1879. April 28.—Judgment *vs.* John Hitz for..... $10,000 00
Interest on same at 7 per cent. from October 14, 1878, until paid, cost of protest..... 1 85
Costs of suit..... 25 25

1879. June 5.—*Fi. fa.* issued and returned *nulla bona.*

Test: R. J. MEIGS, *Clerk.*
[SEAL.] By J. R. YOUNG, *Ass't Clerk.*
June 5, 1879.

Original Writ.

In the Supreme Court of the District of Columbia.
June 9, 1879.

NATIONAL METROPOLITAN BANK OF WASHINGTON, Complainant,
against
JOHN HITZ ET AL., DEFENDANTS. } No. 6,822. Equity Docket 19.

The President of the United States to John Hitz, Jane C. Hitz, William G. Metzerott, and Samuel Cross, defendants.

You are hereby commanded to appear in this court at it first special term, occurring twenty days after service of this subpœna, and answer the exigency of the original bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. CARTTER,
Chief Justice.
[SEAL.] R. J. MEIGS, *Clerk, &c.*
By M. A. CLANCY, *Ass't Clerk.*

Memorandum.—That the defendants herewith served are to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK OF WASHINGTON } Equity.
vs. } No. 6,822.
JOHN HITZ, JANE C. HITZ, ET AL.

Answer of Jane C. Hitz.

The separate answer of Jane C. Hitz to the bill of complaint in this cause respectfully shows:

First, Second, and Third. The averments in the first, second, and third paragraphs of the bill are admitted, on information and belief, to be substantially correct. But she further says, in answer to the averments contained in said paragraphs, that the said

8 judgment against the said John Hitz was obtained, as she is informed and believes, upon a certain promissory note bearing date on the 14th day of October, 1878, made by the said John Hitz, William F. Mattingly, and Robert B. Donaldson, payable in sixty days from the date thereof to the order of Charles E. Prentiss, with interest at the rate of seven per centum per annum until paid, which said promissory note was indorsed by the said Prentiss and discounted by the complainant, and that the said action at law wherein the judgment was rendered against the said John Hitz was instituted against all the parties to the said note, makers as well as indorsers, and that a judgment upon the said promissory note was, on the 28th day of April, 1879, rendered against the said John Hitz for the sum of $10,000, interest and costs, and on the second day of July, 1879, against the said William F. Mattingly, Robert B. Donaldson, and Charles E. Prentiss for the sum of $10,000, interest and costs; that the said William F. Mattingly, Robert B. Donaldson, and Charles E. Prentiss have taken an appeal to the court in general term from the said judgment so rendered against them; but, as she is informed and believes, and therefore avers and charges, no writ of *fieri facias* or other process to enforce said judgment has ever been sued out or issued in the said cause against the said Prentiss, Donaldson or Mattingly; and she further says, upon information and belief, that no undertaking to operate as a *supersedeas* upon the said judgment has ever been filed in the said cause, nor has any other undertaking been filed therein, and the time prescribed by the rules of this court for filing a *supersedeas* undertaking has long since expired. This defendant is informed by counsel and believes, and therefore charges, that the said judgment can now be executed against the said Mattingly, Donaldson, or Prentiss, notwithstanding said appeal. The said Mattingly and Donaldson interposed a defense to the said suit in their behalf, as she is informed and believes, substantially as follows, to wit: That the said complainant, the National Metropolitan Bank, did, at the time of the making of the said promissory note, hold securities consisting of certain stock issued by the said complain-

ant, and stock issued by the German-American Fire Insurance Company of this city, of the aggregate value of $11,000, and that the said securities were pledged to the said complainant for the payment of the said note, but that the said
9 complainant unlawfully allowed said collaterals to be withdrawn by said German-American National Bank as security for the said note after the same had been discounted by the complainant, and permitted the said securities to be applied to other purposes without the knowledge or consent of the defendants Mattingly and Donaldson; that the securities were amply sufficient to have paid the note and interest in full, and would have done so if the complainant had retained them and applied them, as it was in duty bound to do, to that purpose; and further, that the complainant was informed and aware of the fact that the said note was made and indorsed by the said defendant solely for the benefit of the German-American National Bank, and that the proceeds thereof went to its use. This defendant does not know whether or not the allegations set forth by them as constituting the said defense are true; but if they be true, she says she is entitled to and she claims to have the benefits thereof. This defendant is informed and believes, and therefore charges, that the said William F. Mattingly and the said Robert B. Donaldson are solvent and amply able, and either one of them is amply able, to pay the said judgment; and each of them owns sufficient property in the District of Columbia out of which the same may be made through the means of an execution on said judgment.

Fourth. She admits that the allegations contained in the fourth paragraph of the bill are true, and she says, in addition thereto, that she was married to the said John Hitz on the 5th day of August, 1856, and that they have lived together as man and wife ever since, and that they have two children, the result of that marriage, to wit, Anna Gertrude Hitz, of the age of eighteen years, and William Henry Hitz, of the age of eleven years, who now reside in the city of Washington with this defendant. She further says that she is the daughter and sole heir at law of Michael Shanks, late of the District of Columbia, now deceased, who departed this life intestate on the 20th day of May, 1864, leaving this defendant, his daughter, and Catharine N. Shanks, his widow; that the said Catharine N. Shanks, widow, resided in the city of Washington from the time of the death of the said Michael Shanks until the 26th day of January, 1879, when she died; that the said Michael Shanks
10 at the time of his death was the owner and possessor of a large fortune, consisting of personal property of about the value of $110,000, and of real estate of about the value of $185,000; that the real property mentioned in the fourth paragraph of the said bill was part of the said realty, and was inherited by her from her said father.

Fifth. She is advised by counsel and believes that the conclusions

of law stated in the fifth paragraph of the said bill are erroneous; and she is advised by counsel and believes that the said property is not subject to be levied upon to pay any of the debts of the said John Hitz.

Sixth. She admits that the deed of conveyance mentioned in the sixth paragraph of the said bill was made, and she avers that it was properly and lawfully made, delivered, and recorded.

Seventh. She denies that the said deed to said Metzerott and Cross was voluntary and without consideration, and with intent to hinder, delay, and defraud the complainant, or to hinder and delay anybody else. She is advised by counsel and believes, and therefore avers, that the said deed was lawfully and properly made. She further alleges, upon information and belief, that the debt represented by the said promissory note, upon which the said judgment at law was obtained against the said John Hitz, was originally contracted at the date of said note, and that the same was contracted for the exclusive benefit of the German-American National Bank; that the said John Hitz was president of the said bank, the said Charles E. Prentiss cashier, and the said Mattingly and Donaldson were directors, and that the proceeds of the said note were paid into and used by the said bank. And she also avers that no suit at law of any kind had been instituted or was pending against the said John Hitz at the time the said conveyance was made, and that no lien had been secured upon the said property, or had inured to the benefit of any of the creditors of the said John Hitz, prior to the date and delivery of the said deed of the 9th of December, 1878. She further states, in answer to the charges in said paragraph, that the said deed was made and delivered to her for a valuable consideration; that she, in order to obtain the said deed and to secure her personal rights and separate estate, executed, duly acknowledged, and delivered a deed conveying the absolute fee-simple title in and to a certain piece of property belonging to her, and
11 inherited from her father, of the value of from ten to fifteen thousand dollars at the time of said conveyance to Metzerott and Cross; and that the said John Hitz, immediately after the failure of the German-American National Bank, and to secure the payment of such moneys as might be found due from him to said bank, executed and delivered to Benjamin U. Keyser a deed, whereby he conveyed unto the said Benjamin U. Keyser all the real estate standing in her name, (most of which was bought with her money,) and that this defendant joined in the said deed, and in addition to the foregoing considerations other valuable considerations existed.

Eighth. She says that she has no personal knowledge as to whether a levy was made upon the said property by virtue of an execution issued out of and upon the said judgment; but she is advised by counsel and believes, and therefore avers, that if such a

levy was made it does not constitute a lien upon the said property, and that such a levy, if made, is null and void.

Ninth. In answer to the averments contained in the ninth paragraph of the said bill, she denies the truth of the averment therein; that said Metzerott and Cross did not accept the said trust, and that the said conveyance has never been lawfully executed and delivered to or accepted by the grantees therein named. She alleges the truth to be, that the said William G. Metzerott did agree and consent to accept said trust, and she says, upon information and belief, that said Cross also agreed to accept, and did accept, said trust, and that the said deed of the 9th of December, 1878, was regularly and lawfully made and delivered to the said trustees, with the consent and full understanding of all the matters therein contained on the part of the said Samuel Cross and William G. Metzerott; and she is advised by counsel and believes that the said disclaimer mentioned in the said paragraph of the said bill as having been made and recorded by the said William G. Metzerott and Samuel Cross is void and of no effect so far as the title to the said property and interests of this defendant are concerned; and she further says and charges that the said deed to said Metzerott and Cross was lawfully delivered to the said Metzerott, and was then by him delivered to this defendant, and that she, as she had a right to do, afterwards
12 caused the same to be recorded amongst the land records of the District of Columbia; that the said deed was made for the purpose of securing to her the benefits of the payments of her father's estate which had been inherited by her, and for the purpose of operating as a waiver or disclaimer, full and absolute, on the part of the said John Hitz, of any and all interest which he might or could have had in and to her estate thus inherited as aforesaid. Said conveyance was also intended to operate as a provision for her and her children, and was in further consideration of her separate estate theretofore appropriated by said John Hitz to his own use and benefit. She denies that the said deed was to be held by the said Metzerott, or anybody else, until certain transactions connected with the German-American National Bank should be closed up. She avers that there was no such understanding; that the deed was not made and delivered for any such purpose, but was to secure this defendant in all her rights, as before stated.

Further answering, she says that she is advised by counsel and believes that the said paper-writing called a "disclaimer," recorded as aforesaid by the said Metzerott and Cross, was recorded by the recorder of deeds without authority of law, and that the record thereof is null and void.

Tenth. Touching the averments contained in the tenth paragraph of the said bill, she is advised by counsel and believes that the conclusions of law therein stated are incorrect.

Eleventh. Answering the eleventh paragraph of the bill, she says that she is advised by counsel and believes, and therefore

avers, that the said complainant is not entitled to have the rents, issues, and profits of the said property, and that said complainant is not entitled to interfere in any way with the said property, or with the rents, issues, and profits thereof.

Twelfth. Further answering the matters and things in the said bill of complaint, she says that she inherited from her father a fortune, amounting to somewhere about the sum of $270,000, and that since the death of her father she has spent a large portion of her time traveling on the continent of Europe and elsewhere, and therefore she left the conduct of the affairs connected with her estate with her said husband, John Hitz; and that repairs
13 and sales were made and purchases were made out of her funds, and without interference on the part of this defendant with the management of the estates by the said John Hitz until the time of the failure of the German-American National Bank. At the time of the failure of the said bank, she began an examination of the affairs of her estate, and found not only that all her fortune which she had received out of the personal property of her father had been lost by mismanagement by her said husband, or had been by him converted to his own use. She had been unable to ascertain accurately, and therefore cannot state, what disposition was made of these large sums of money by the said John Hitz; that all that now remains of her fortune for the support of herself and her two children is the real property mentioned and described in the said bill of complaint, except a small portion of personal property given to her by her mother, now deceased. She says that if the prayer of the bill shall be granted, and the rents, issues, and profits of her said realty taken from her, she will have no adequate means of support for herself and children.

Thirteenth. She is advised by counsel and believes that, even if the said complainant has a right to interfere with her real property in consequence of her marital relations with the said John Hitz, which she denies, this court, before allowing any diversion of her income, should require that a proper and suitable provision shall be first made out of the estate for the support of herself and children.

Fourteenth. She further says, in answer to the matters and things in said bill of complaint, that her mother, at the death of her said father, became entitled to one-third of the real estate belonging to the said Michael Shanks during her natural life, and that she (her said mother) continued to receive the said income, or its equivalent, until the time of her death, to wit, on the 26th day of January, 1879, as hereinbefore stated; and she is advised by counsel, and therefore charges, that as to one-third of the real estate mentioned and described in the said bill, and by her inherited as aforesaid, the said marital interest of said John Hitz, if he had any, never attached, and that, therefore, none of the creditors of the said John Hitz can in anywise interfere with the one-third of the income of the said property.

Fifteenth. Further answering the said bill, she says that after she discovered that the greater portion of her said inheritance had been lost or appropriated to his own use by the said John Hitz, and about the first of November, 1878, she assumed exclusive control over all her property, and that the said John Hitz thereupon relinquished all control over it, and ceased from that time to interfere directly or indirectly with the management or conduct of her estate or any part thereof; that since that time she has maintained exclusive control over and possesion of it, and still continues to possess and control it, and that she collects the rents, issues, and profits thereof and appropriates them to her own use and benefit, as she is advised by counsel and believes she has a lawful and perfect right to do. She further says that, in order to remedy in part the wrongs that have been inflicted upon her through the misappropriations and mismanagement of her property and estate by the said John Hitz, the said deed of trust to Metzerott and Cross, of the 9th of December, 1878, was made, acknowledged, delivered, and recorded.

Sixteenth. Further answering the said bill, she says that she is advised by counsel and believes that the said complainant has a full and adequate remedy at law on their said judgment, and that it ought not to be allowed to harass this defendant or to interfere with her property or any part or parcel thereof.

Seventeenth. Further answering the said bill, defendant says that a deed of conveyance, dated June 16, 1877, appears upon the land records of the District of Columbia, purporting to have been signed and acknowledged by this defendant, which said deed purports to convey a large and valuable parcel of improved ground in the city of Washington of the value of thirty or forty thousand dollars, situated on the corner of Ninth ond G streets northwest, in Washington City, to one Sarah L. Crane; and this defendant avers that she has no recollection of having executed or delivered any such deed. She never received any consideration whatsoever for said property, directly or indirectly, from said Crane, or from any person for her; she never knew the nature of the said conveyance or the purpose for which it was apparently made, or that there was such a deed, until after the failure of the said bank; and she avers that, if she executed the said deed, it was wrongfully procured from her by said defendant, John Hitz, or others acting with or for him. She further says that the said property was afterwards procured to be incumbered by said Hitz for the sum of $20,000, which said sum was appropriated to pay, as she is informed and believes, the individual debts of the said Hitz in the German-American National Bank. She further says that a previous incumbrance of about $20,000 had been placed upon the said property through the same or similar means by said Hitz, which he now asserts has been paid or cancelled by the funds derived from the incumbrance as above mentioned; but she states

that a bill has been filed in the chancery side of this court by the receiver of the said German-American National Bank, and the same is now pending, the object of which bill is to restore the said lien as a prior incumbrance upon the said property.

Eighteenth. She further says that she inherited from her deceased father about $44,000 in bonds, &c., and about $17,400 in stock issued by the National Metropolitan Bank or its predecessor, most of which the said defendant Hitz, without her knowledge or consent, converted to his own use; that a large part of the proceeds of the said stock, bonds, &c., was invested in real estate in the city of Washington, and known as lots five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, in square eight hundred and thirty-four, being situated at the junction of Pennsylvania avenue and Sixth street southeast, in the city of Washington, and the same was conveyed to said Hitz, and not to this defendant. She further says that the said property, so purchased as aforesaid with her separate estate, was included in the said deed of trust to Benjamin U. Keyser, hereinbefore mentioned, to secure the general indebtedness of the said Hitz to the said German-American National Bank.

Nineteenth. The defendant, John Hitz, is now 52 years of age, and this defendant is 42 years of age.

And having fully answered the said bill of complaint, she prays to be hence dismissed, with her reasonable costs and expenses.

JANE C. HITZ.

ENOCH TOTTEN,
Attorney for defendant, Jane C. Hitz.

DISTRICT OF COLUMBIA, }
COUNTY OF WASHINGTON. } *ss.*

Jane C. Hitz, being first duly sworn, deposes and says that
16 she has read the foregoing answer by her subscribed, and knows the contents thereof; that the facts therein stated upon personal knowledge she knows to be true, and the facts therein stated upon information and belief she believes to be true.

JANE C. HITZ.

Subscribed and sworn to before me, this 6th day of October, A. D. 1879.

HUGH T. TAGGART,
[SEAL.] *Justice of the Peace.*

Endorsed: Equity, No. 6,822. National Metropolitan Bank of Washington *vs.* John Hitz, Jane C. Hitz, et al. Separate answer of defendant Jane C. Hitz. Enoch Totten, Sol'r. Filed October 8, 1879. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK OF WASHINGTON
vs.
JOHN HITZ, JANE C. HITZ, ET AL.
} Equity. No. 6,822.

Separate Answer of John Hitz.

The separate answer of John Hitz to the bill of complaint of the above-named complainant shows as follows:

First, Second, and Third. This defendant admits that the averments contained in the first, second, and third paragaphs of the said bill are substantially true. He further says, in answer thereto, that judgments were rendered in the said cause, at law, against the defendants Robert B. Donaldson, William F. Mattingly, and Charles E. Prentiss, as well as against this defendant; and he also says that the said Robert B. Donaldson and the said William F. Mattingly are solvent, and, as he is informed and believes and charges, have sufficient property in the District of Columbia out of which the amount of the said judgment can be made by execution. The said promissory note was made and negotiated for the exclusive benefit of the German-American National Bank, and not for the benefit of this defendant, or of any of the other defendants to the said suit at law; that the proceeds derived from the said note were paid into and used by the said German-American National Bank, and the officers of the said complainant well knew these facts.

Fourth. He admits the averments contained in the fourth paragraph of the bill.

17 Fifth. In answer to the fifth paragraph of the said bill, he says he is advised by counsel and believes that the conclusions of law set forth in the fifth paragraph of the said bill, as to the rights of the complainant, are not correct; and he says, in addition thereto, that he has, by an instrument in writing duly executed, acknowledged, and recorded, disclaimed all right, title, and interest on his part in and to any of the estate of the said defendant Jane C. Hitz, by her inherited from her father, and particularly in the real estate mentioned in the said bill of complaint; and that he has not now and does not claim any interest in and to any of her said property. He further says that on or about the 1st of November, 1878, he ceased to have anything to do, directly or indirectly, either as agent of Mrs. Hitz or otherwise, with the real estate or personal property belonging to the said Jane C. Hitz by her inherited from her father, and that he has not since that time in anywise interfered with the same. And he further says that he never has asserted and has never known or believed that he had any control over, ownership of, or estate in any of the property inherited by his said wife, Jane C. Hitz, by virtue of his marital relations, and does not seek now to do so.

Sixth. He admits that the averments in the sixth paragraph of the said bill are substantially correct.

Seventh. In answer to the averments of the seventh paragraph of the said bill, this defendant says that the said conveyance to William G. Metzerott and Samuel Cross was not voluntary and without consideration. He says, on the contrary, that the same was for a valuable consideration; that the said Jane C. Hitz conveyed her absolute fee simple title to certain valuable property, at the request of this defendant, and in consideration and upon condition that he would execute in due form of law and deliver the said conveyance to the said Metzerott and Cross; she also conveyed her dower estate in such property as stood in his name to Benjamin U. Keyser, at the urgent request of this defendant, to secure the payment of any balance which might be found due to the said bank; and he also says that other and more valuable considerations for the execution of the said deed existed at the time. He further says that the said deed was not intended to hinder or delay any of his creditors, but was for the purpose of making and placing on record a full, absolute, and free disclaimer and
18 waiver of all interest whatsoever which could in anywise be said to appertain or belong to him by virtue of his marital relations, and to remove all doubts in regard to the title of said Jane C. Hitz in and to the real estate inherited by her from her father, as he was advised by counsel and believed he had a lawful right to do; and that instead of trying to hinder, delay, or cheat his creditors, he was endeavoring to do justice to his wife and her children, and secure them beyond cavil the remainder of the large fortune which his said wife inherited from her father. Further answering this paragraph of the said bill, he says that the debt evidenced by the said promissory note upon which the said judgment at law was rendered against him and the said Prentiss, Donaldson, and Mattingly was created in the year 1878, at the date of the said note, and was for the sole benefit of the German-American National Bank, of which this defendant was president, the said Prentiss cashier, and the said Donaldson and Mattingly were directors, and that the said indebtedness was not created on the credit of the property belonging to the said Jane C. Hitz and inherited by her as aforesaid.

Eighth. To the eighth paragraph of the said bill, he says that he does not know whether a levy has been made as therein stated, but he is advised by counsel and believes that that if there has been such a levy, it does not create a lien upon the said property, and the said complainant, by virtue of the said judgment or the said lien, has no right to interfere with the said property, or molest the said Jane C. Hitz in her property in any way.

Ninth. Answering the ninth paragraph of the bill, he says that it is not true, as therein alleged, that the said Metzerott and the said Cross never accepted the trusts confided to them under and by virtue

of the said deed of the 9th day of December, 1878. He declares the truth to be, that the said Cross and Metzerott, each and both of them, well understood the nature of the said deed, and understood the purposes for which it was executed and delivered, and that they and each of them intended to and did accept the trust created thereby; and this defendant also denies that he was a party to any agreement or understanding that the said deed of conveyance should be held in escrow for the purposes mentioned in the said paragraph of the bill, or for any other purposes, by the said
19 Metzerott or anybody else. He alleges that the truth is, that the said deed was executed for the purpose of disclaiming by an instrument of record all title and interest on the part of this defendant in and to the said property therein mentioned, which had been inherited from her father's estate by the said Jane C. Hitz, as hereinbefore stated; that it was, as he is advised by counsel and believes, the separate estate of the said defendant, Jane C. Hitz, and this defendant has always heretofore treated it as such; and this defendant does not now assert, and never has asserted, any title in him in and to the said premises, and that he does not now claim any title or interest thereto or therein; he further says that the truth is, that he has never had anything to do with said estate of Jane C. Hitz except as her agent, and that separate accounts of the income thereof have always been kept, thus treating the property as her separate estate coming from the estate of M. Shanks, deceased; he further says that the said deed was made in good faith for the purpose of securing to the said defendant, Jane C. Hitz, and her children the inheritance from her father, as hereinbefore stated. He admits that it is true that the said Samuel Cross and William G. Metzerott did afterward execute some kind of a paper-writing or declaration, whereby they undertook to disclaim all title and interest in to the said premises so conveyed to them in trust, as in said bill stated, and that the same was filed for record and was recorded; but, as he is advised by counsel and avers, the said paper was recorded upon the land records of the District of Columbia without authority of law, and that the record thereof is void. This defendant is further advised by counsel, and therefore avers, that the said paper-writing called a "disclaimer" is null and void so far as this defendant is concerned, and so far as the rights of the said Jane C. Hitz and her interest and title in the said property are concerned.

Tenth. In answer to the tenth paragraph of the said bill, this defendant denies that the said conveyance therein mentioned is fraudulent and void as against the complainant, and avers that the same is lawful and valid.

Eleventh. In answer to the eleventh paragraph of the bill, he says that he is advised by counsel and believes, and therefore avers, that the complainant has no right to the rents, issues, and profits
20 of the said property or any part thereof, nor a right to

any such relief as is demanded in and by the said bill of complaint.

Twelfth. He avers that the said complainant has a full and adequate remedy at law in the premises.

And, having fully answered, this defendant prays to be hence dismissed.

JOHN HITZ.

W. B. WEBB, *Solicitor.*

DISTRICT OF COLUMBIA, } *ss:*
COUNTY OF WASHINGTON, }

John Hitz, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed, and knows the contents thereof; that the facts therein stated upon information and belief he believes to be true, and that the facts therein stated upon personal knowledge are true.

JOHN HITZ.

Subscribed and sworn to before me this 8th day of October, 1879.

R. J. MEIGS, *Clerk,*
By M. A. CLANCY, *Ass't Clerk.*

Endorsed: Filed Oct. 8, 1879. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ, JANE C. HITZ, WILLIAM G. METZEROTT, and Samuel Cross. } Equity No.

The separate answer of William G. Metzerott, one of the defendants, to the bill of complaint of the National Metropolitan Bank.

This respondent, saving all exception to the manifold errors and uncertainties in said bill contained, for answer thereunto, or unto so much thereof as he is advised it is necessary or material for him to make answer, answering, says:

1. He admits the first, second, and third paragraphs of complainant's bill.

21 2. He admits so much of the fourth paragraph of said bill as relates to the marriage and issue thereof by reason of said marriage aforesaid; that as to the residue of said paragraph setting forth the ownership of certain real estate therein described, this respondent can only answer upon information and belief, and from said information and belief he believes it to be true as set forth in said paragraph.

3. Answering the fifth paragraph of said bill, respondent says he is advised that the allegation set forth in said paragraph is a conclusion of law; therefore he cannot answer the said paragraph.

4. Answering the sixth parapraph of complainant's bill, respondent admits the execution of the conveyance therein set forth from the defendants, John Hitz and Jane C. Hits, to this respondent and his co-defendant, Samuel Cross, and marked and filed as an Exhibit No. 2 with said bill of complaint; the same has been recorded among the land records for the District of Columbia.

5. Answering the seventh paragraph of said bill, respondent says that said conveyance last above mentioned was executed by the grantors therein named to the grantees therein mentioned on or about the 9th day of December, A. D. 1878; that said conveyance was duly acknowledged and attested to convey the real estate therein described and for the purposes and trusts therein indicated; that said deed of conveyance was at once delivered to this respondent, one of the grantees to said conveyance, to be by this respondent held in escrow until certain business transactions between the said John Hitz and the German-American Bank of the District of Columbia, should be adjusted, settled, and closed up by said John Hitz; that upon the settlement of said demands against said John Hitz, then said deed of conveyance should be delivered to said Jane C. Hitz for record, but not otherwise; that said John Hitz did not, and has not up to this period, satisfied said demands against him, but, on the contrary, said business relations and transactions aforesaid still remain unsettled and not satisfied, either in whole or in part; that in no manner, shape or form has the consideration for which the said conveyance was executed and the same left in escrow as aforesaid been complid with, in whole or in part; that the defendant, Jane C. Hitz, requested this respondent to purchase for her a box for the purpose of
22 keeping articles of value therein, with which request respondent complied; after the purchase of said box this respondent left the deed aforesaid with Jane C. Hitz, for the sole and express purpose of keeping the same securely until the said John Hitz should fully perform, carry out, and complete his part of said agreement, which was the moving consideration that led to the execution and delivery in escrow of said deed aforesaid; that the defendant, Jane C. Hitz, knew full well at the time respondent left with her the said deed, that said agreement had not been carried out by said John Hitz, and that she was violating the trust reposed in her from long acquaintance by this respondent when she placed the same on record; that said grantees in said deed aforesaid had not, and have not as yet, accepted of the said trusts contained and set forth in said conveyance, for the reason that said John Hitz has totally failed to perform the agreement or contract on his part agreed to be performed, and it was expressly understood by and between the grantors that said deed should not be

admitted to record among the land records for the District of Columbia until the said agreement aforesaid had been fully complied with by said John Hitz, and that said deed was to be held as aforesaid until said Hitz did so comply, on his part, to the fulfillment thereof, and that until said final settlement thereof, no title was to pass by or under said deed of conveyance aforesaid.

6. Answering the eighth paragraph of said bill, respondent says he knows nothing save what is exhibited from the record.

7. Respondent says he admits the ninth paragraph of said bill, and thinks his fifth paragraph of his answer will be a sufficient answer to this paragraph.

8. Respondent can neither admit nor deny the matters and things set forth in the tenth and eleventh paragraphs of said bill, and having answered, prays hence to be dismissed, &c.

W. G. METZEROTT.

CITY OF WASHINGTON, } *to wit:*
DISTRICT OF COLUMBIA, }

I, William G. Metzerott, being duly sworn, say: That I have read the foregoing answer by me subscribed, and know the
23 contents thereof; that the facts therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

W. G. METZEROTT.

Subscribed and sworn before me June 18, 1879.

R. J. MEIGS, *Clerk S. C. D. C.*
By R. J. MEIGS, JR., *Ass't.*

Endorsed: Filed Dec. 18, 1879. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK } In Equity. 6,822.
vs.
JOHN HITZ ET AL. }

The complainant hereby joins issue with the defendants, John Hitz, Jane C. Hitz, and William G. Metzerott.

NATHANIEL WILSON,
Sol'r for Compl't.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK } Equity. No. 6,822.
vs.
JOHN HITZ ET AL. }

On motion of plaintiff, by its solicitor, it is this 22d day of December, 1879, ordered that the above case be, and the same is

hereby, referred to Bertram Zevely, an examiner of this court, to take the testimony of such witnesses as may be brought before him.

By the court: MACARTHUR, *Justice.*

Stipulation of Counsel as to Evidence.

Exhibit N. M. B. Z.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK *vs.* HITZ ET AL. } No. 6,822. Eq. Doc. 19.

It is hereby stipulated and agreed that copies of the following deeds, certified to be true copies by the register of deeds of the District of Columbia, may and shall be read and considered in evidence in the above-entitled case and at the hearing thereof, and the execution of the originals thereof shall be considered as duly proved without other evidence of the execution of the same other than this stipulation; subject, however, to each and every exception that may be taken to the admissibility of said deeds, or any or either of them, as evidence in said cause:

24

John Hitz and Jane C. Hitz to Wm. G. Metzerott and Sam'l Cross. } Rec'd for record May 13, 1879.

John Hitz and Wife to Wm. F. Mattingly et al. } Recorded December 21, 1878. Liber 902, folio 444.

John Hitz and Wife to Benj. U. Keyser. } Recorded January 11, 1879. Executed November 2, 1878. Liber 906, folio 203.

It is further stipulated and agreed that it shall be held and considered as proven in this cause that Benjamin U. Keyser, the receiver of the German-American National Bank, has heretofore brought suit against John Hitz, defendant, on the following described notes, held by said bank at the time of its failure:

The note of John Hitz dated May 16, 1878, payable six months after date, to the order of C. E. Prentiss, trustee, for $2,415.60 and interest.

The note of John Hitz dated May 16, 1878, payable six months after date to the order of E. P. Halstead, for $5,103.33 and interest.

The note of John Hitz dated May 16, 1878, payable to the order of six months after date, for $4,600 and interest.

The note of S. Prentiss dated May 10, 1878, payable to the order of John Hitz and endorsed by him, for $4,500 and interest.

The note of C. E. Prentiss, trustee, dated May 16, 1878, payable to the order of John Hitz and indorsed by him, for $3,400 and interest.

The note of C. E. Prentiss, trustee, dated May 16, 1878, payable to the order of John Hitz and indorsed by him, for $2,441.17 and interest.

25 The note of S. Prentiss dated May 16, 1878, payable to the order of John Hitz six months after date, for $7,200 and interest.

And that in said suit the said Keyser obtained judgment against the said Hitz on the 3d day of December, 1879, for $29,660.10, with interest, &c., in case No. 21,329, at law, in the Supreme Court of the District of Columbia.

But it is not admitted that the said matters and things relating to said notes and judgment thereon above set forth are competent and proper evidence upon the issues in this case, but the facts are admitted as stated, subject to the objections as to competency and materiality on the part of the defendants.

NATHANIEL WILSON,
Solicitor for Plaintiff.
ENOCH TOTTEN,
Attorney for Mrs. Hitz and Mr. Hitz.

Deed: John Hitz et ux to Wm. G. Metzerott and Sam'l Cross.

N. M. B. Exhibit No. 2.

[Received for record May 13th, 1879, 10.30 A. M.]

John Hitz et ux
to
Wm. G. Metzerott and Sam'l Cross. } Deed.

This indenture, made this ninth day of December, in the year of our Lord one thousand and eight hundred and seventy-eight, between John Hitz and Jane C. Hitz, his wife, of the first part, and William G. Metzerott and Samuel Cross of the second part, all of the District of Columbia, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid by the said parties of the second part before the ensealing and delivery of these presents, receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and do by these presents grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns, all those several pieces and parcels of ground situated and lying in the city of Washington, in the District aforesaid, described as follows, viz: Lots numbers "one" (1) and "twenty" (20) and that part of lot number "two" (2) formerly owned by Michael Shanks,

26 late of said city, deceased, in square number "one hundred and forty-three" (143); also lot number "four" (4) in

square "three hundred and seventy-nine" (379); also all that part of lot number "eleven" (11) in square "four hundred and three" (403), bounded as follows, viz: Beginning for the same on Eighth street, at the dividing line of lot "ten" (10) and said lot "eleven" (11), and running thence south along the line of Eighth street forty feet (40 ft.), thence at right angles with said street ninety-nine feet (99 ft.) four inches to the rear of said lot, thence along the rear line of the same north forty feet (40 ft.), and thence along the dividing line aforesaid east to the beginning; together with the improvements and appurtenances to all said granted premises belonging or appertaining; to have and to hold the same unto and for the only use and behoof of the said parties of the second part, their heirs and assigns forever. In trust, nevertheless, for the sole, separate, and exclusive use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband and from any liability for his debts, and to permit her to have the possession, use, and income of said premises, and further, to lease, sell, mortgage, convey, and otherwise dispose of such premises, or any part thereof, in such manner and for such interests and estates as she may direct and appoint by her instrument of writing under her hand and seal and attested by two witnesses, and whether such direction and appointment be of a testamentary character, to go into effect after her death, or otherwise, and in remainder, after her death, in the absence of any such direction and appointment, or subject thereto, to hold the said premises for the use of the children of said Jane C. Hitz living at the time of her death, and the children of any deceased children, so that the latter shall take the same share in said property which their parents would take if living, their heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JOHN HITZ. [SEAL.]
JANE C. HITZ. [SEAL.]

Signed, sealed, and delivered in our presence.
HARTWELL P. HEATH.

27 DISTRICT OF COLUMBIA, } *set.*
COUNTY OF WASHINGTON. }

I, Hartwell P. Heath, a notary public in and for the county aforesaid, do hereby certify that John Hitz and Jane C. Hitz, his wife, parties to a certain deed bearing date on the ninth day of December, in the year eighteen hundred and seventy-eight, and hereto annexed, personally appeared before me, at the county aforesaid, the said parties being personally well known to me as the persons who executed said deed, and the said John Hitz acknowledged the same to be his act and deed; and the said Jane C. Hitz being by me examined privily and apart from her said husband, and having the

deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal, this ninth day of December, A. D. 1878.

[NOTARIAL SEAL.] HARTWELL P. HEATH,
Notary Public.

Exhibit N. M. B. X.

Deed: John Hitz et ux to William F. Mattingly et al.

[Recorded December 21, 1878, 11.40 A. M.]

John Hitz et ux
to
William F. Mattingly et al. } Deed of Trust.

This indenture, made this eighteenth day of December, in the year of our Lord one thousand eight hundred and seventy-eight, between John Hitz and Jane C. Hitz, his wife, of the first part, and William F. Mattingly and Charles E. Prentiss of the second part, all of the county and city of Washington, in the District of Columbia, witnesseth:

Whereas, by deed dated May 1, 1875, the said John Hitz conveyed the hereinafter described premises to L. Cornelia Hatch, her heirs and assigns, and, in order to perfect said transfer, it was intended to procure a further conveyance from the said Jane C. Hitz, who was then absent in Europe, but the same was omitted through oversight;

And whereas the said L. Cornelia Hatch and her husband, Horace Hatch, afterwards, by deed of the same date last aforesaid, conveyed the said premises to said William F. Mattingly and Charles E. Prentiss, in trust to secure the payment of three certain promissory notes, each for five thousand dollars, in favor of said John Hitz as trustee, as upon reference to the same will more fully appear;

28

And whereas, for the correction of the omission aforesaid, the said parties of the first part have agreed to execute these presents:

Now, therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises and of the sum of one dollar to them in hand paid by the said parties of the second part before the ensealing and delivery of these presents, receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and do by these presents grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns, all that lot of ground in the city of Washington aforesaid known and described as lot number "thirteen" (13) in reservation number "ten" (10) with the improvements and appurtenances, to have and to hold the same unto and for the only use and behoof of

the said parties of the second part, their heirs and assigns; in trust, nevertheless, to hold and apply the same upon the trusts expressed and declared in the aforesaid deed from Horace Hatch and L. Cornelia Hatch to the said parties of the second part. In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first aforesaid.

JOHN HITZ. [SEAL.]
JANE C. HITZ. [SEAL.]

Signed, sealed, and delivered in our presence.
A. C. BRADLEY.

DISTRICT OF COLUMBIA, } *sct.*
COUNTY OF WASHINGTON, }

I, Andrew C. Bradley, a notary public in and for the county aforesaid, do hereby certify that John Hitz and Jane C. Hitz, his wife, parties to a certain deed bearing date on the 18th day of December, A. D. 1878, and hereunto annexed, personally appeared before me at the county aforesaid, the said parties being personally well known to me as the per-
29 sons who executed said deed, and acknowledged the same to be their act and deed; and the said Jane C. Hitz being by me examined privily and apart from her said husband, and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this eighteenth day of December, 1878.

A. C. BRADLEY, [SEAL.]
Notary Public.

Exhibit N. M. B. Y.

Deed: John Hitz et ux to Benjamin U. Keyser, Receiver.

[Recorded January 11, 1879, 11.10 A. M.]

John Hitz et al.
to
Benjamin U. Keyser, Receiver. } Trust.

This indenture, made this 2d day of November, in the year of our Lord one thousand eight hundred and seventy-eight, between John Hitz and Jane C. Hitz, of the city of Washington, in the District of Columbia, of the first part, and Benjamin U. Keyser, receiver of the German-American National Bank, of the second part: Whereas the said John Hitz, as a stockholder of and in the German-American National Bank, is indebted to said bank and to the depositors thereof in an amount not yet liquidated and ascer-

tained, and is desirous of securing said indebtedness: Now, therefore, this indenture witnesseth that the said parties of the first part, for and in consideration of the premises aforesaid, and further, the sum of one dollar in lawful money of the United Sthtes to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed, and confirmed, and do by these presents grant, bargain, sell, alien, enfeoff, release, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the following described real estate and premises situated, lying, and being in the city of Washington aforesaid, in the District of Columbia, known and designated as part of lot number ten (10) in square number four hundred and three (403) assigned in the name of said John Hitz; lot number two hundred and twenty-five (225) in the subdivision of square six hundred and seventy-five (675), and lots five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, in square number eight hundred and forty-four (844), together with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim, either at law or in equity, or otherwise however, of the said parties of the first part of, in, to, or out of the said described real estate and premises. To have and hold the said described real estate and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns, forever. In and upon the trusts nevertheless hereinafter mentioned and declared; that is, in trust to permit the said parties of the first part, their heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof, to take, have, and apply to and for their sole use and benefit until default be made in the payment of said indebtedness, or the interest thereon, when as the same shall become due and payable, or any proper cost, charge, commission, half-commission, or expense in and about the same. And upon the full payment of all of said debt, and the interest thereon, and all other proper costs, charges, commissions, half-commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said parties of the first part, their heirs or assigns at their cost. And upon this further trust, that upon any default or failure being made in the payment of the said indebtedness, or of any installment of interest thereon, when and as the same shall become due and payable, or any proper cost, charge, commission, half-commission, or expense in and about the same, then and at any time thereafter to sell the said described real estate and premises at public auction, upon such terms and conditions and at such time and place and after such previous public advertisement as the said party of the second part, or his heirs or the trustee acting in the execution of this trust, shall deem advantageous and proper;

and to convey the same in fee simple to and at the cost of the
31 purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money and of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said indebtedness and the interest thereon, whether the same shall be due or not; and lastly, to pay the remainder, if any, to said parties of the first part, their executors, administrators, or assigns. And the said parties of the first part do hereby agree, at their own cost, during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against fire, in the name and to the satisfaction of said party of the second part, who shall pay whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; and also to pay all taxes and assessments, both general and special, that may become due on or be assessed against said real estate and premises during the continuance of this trust, and that upon any default or neglect to so insure or to pay said taxes and assessments, any party secured hereby may have said improvements insured and pay said taxes and assessments, and the expense thereof shall be a charge hereby secured and bear like interest as the matter secured. And it is further agreed that if the property shall be advertised for sale under the provisions of this deed of trust and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JOHN HITZ. [SEAL.]
JANE C. HITZ. [SEAL.]

Signed, sealed, and delivered in the presence of—

DISTRICT OF COLUMBIA, }
WASHINGTON COUNTY, } *ss*:

I, S. F. Austin, a notary public in and for the said county, in said District, do hereby certify that John Hitz and Jane C. Hitz, his wife, parties to a certain deed bearing date on the
2d day of November, A. D. 1878, and hereto annexed,
32 personally appeared before me in said county, the said parties being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Jane C. Hitz being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and

deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and my official seal, this day of November, A. D. 1878.

S. F. AUSTIN, [SEAL.]
Notary Public.

Endorsed: This is to certify that the within is a true and verified copy of a deed as recorded in Liber No. 906, folio 203 *et seq.*, one of the land records for the District of Columbia.

Washington, D. C., March 8, 1880.

GEO. F. SCHAYER, [SEAL.]
Dep. Recorder.

Exhibit N. M. B. No. 3.

Deed in Trust: John Hitz and Wife to Wm. G. Metzerott and Sam'l Cross.

[Received for record May 26, 1879, 12 M.]

John Hitz and Jane C. Hitz, his wife, to William G. Metzerott and Samuel Cross. } Deed in Trust.

Whereas the grantors hereto, by their deed dated on the 9th day of December, A. D. 1878, executed and acknowledged on the same day, conveyed to the grantees hereto the following described real estate, situate in the District of Columbia: Lots 1 and 20, and that part of lot No. 2 formerly owned by Michael Shanks, late of the city of Washington, deceased, in square No. 143; also lot No. 4 in square No. 379; also all that part of lot 11 in square 403, beginning for the same on Eighth street at the dividing line of lot 10 and said lot 11, and running thence south along the line of Eighth street 40 feet, thence at right angles with said street 99 feet 4 inches to the rear of said lot; thence
33 along the rear line of the same north 40 feet, and thence along the dividing line aforesaid east to the beginning, with the appurtenances, improvements, &c., in trust for the sole and exclusive use and benefit of said Jane C. Hitz for and during the term of her natural life, with power to mortgage, convey, and otherwise to dispose of in such manner as she may appoint; that said deed aforesaid was, on the 13th day of May, 1879, recorded in Liber No. 913, folio 437, *et seq.*, among the land records for said District of Columbia. The grantees hereto file this caveat against the recordation of said deed aforesaid, because said deed was not delivered to said Jane C. Hitz for that purpose; that said deed aforesaid was to be held by one of the grantees hereto, to wit, William G. Metzerott, in escrow, until certain transactions between the said John Hitz and the German-American Bank should be closed up and settled; that said transactions still remain

unsettled, and in no way has the consideration for the execution of said deed aforesaid been complied with, in whole or in part; that said grantee, William G. Metzerott, left said deed with said Jane C. Hitz for the sole purpose of holding the same in some secure place until the said John Hitz should perform and carry out his agreement which led to the execution of said deed; that said grantees have not yet accepted of the said trusts contained in said deed for the reason that the grantor, John Hitz, has totally failed to perform the agreement or contract on his part which was the cause and inducement of executing said deed, and it was expressly understood that said deed should not be admitted to record among the land records for the District of Columbia until the said John Hitz had fully completed and performed his part of the agreement, which was the consideration for the execution of said deed aforesaid

W. G. METZEROTT.
SAMUEL CROSS.

Subscribed and sworn to before me, this 26th day of May, 1879.
[SEAL.] FRED. W. PRATT,
Notary Public.

34 NATIONAL METROPOLITAN BANK *vs.* JOHN HITZ ET AL. } Equity. No. 6822.

Memorandum as to Evidence.

It is hereby stipulated that the above paper-writing is a true copy of the original, and it may be considered and read on the hearing of this cause with the same force and effect as if the original had been produced and regularly proven and introduced in evidence in the cause. But the defendants object to its relevancy, materiality, and admissibility.

ENOCH TOTTEN,
For Defendants.
NATHANIEL WILSON,
For Plaintiff.

March 22, 1880.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK, PLAINTIFF, *vs.* JOHN HITZ, JANE C. HITZ ET AL. } Equity No. 6822. Doc. 19.

Depositions of William G. Metzerott and Samuel Cross, witnesses produced and sworn on the part of the complainant in the above-entitled case, before me, Bertram Zevely, an examiner in chancery and United States commissioner, on the 21st and 26th days of January, 1880, between the hours of three (3) and five (5) o'clock P. M.,

at the office of Nathaniel Wilson, 635 F street, northwest, Washington, D. C.

Present: Nathaniel Wilson, Esq., solicitor for complainant, and Enoch Totten, Esq., solicitor for defendants.

First Day—January 21, 1880.

William G. Metzerott, being first duly sworn, deposes and says: I am of lawful age, a resident of the District of Columbia, and am acquainted with the defendants, John Hitz and Jane C. Hitz.

By Mr. Wilson:

Question 1. How long have you known the defendants, John Hitz and Jane C. Hitz?

35 Answer. Between twenty-six and twenty-seven years, I cannot tell exactly.

Q. 2. Where have they resided during that time?

A. In Washington and in Leesburg, Virginia.

Q. 3. How many children have they?

A. They have now two; there were five, but there are only two now living.

Q. 4. State what real estate in the District of Columbia the said Jane C. Hitz has been in the possession of since the second day of July, 1879.

A. She was in possession of the building on Pennsylvania avenue which I partly occupied, and was in possession of several houses on Eighth street, near I street—small houses; one house and piece of ground on the northwest corner of New York avenue and Eighteenth street; and she was then in possession of property at the corner of Ninth and G streets. The real estate is correctly described in the bill of complaint, which I have read.

Q. 5. State who had the management of Mrs. Hitz's estate prior to the failure of the German-American Bank.

A. Her husband, John Hitz.

Q. 6. What arrangement was made with yourself by Mr. Hitz in relation to the payment of the rent of the store which you occupied?

A. I always paid his mother-in-law, Mrs. Shanks, her dower every three months, by instructions from Mr. Hitz, but since her death the payments have been made to the agent of Mrs. Hitz, John Sherman.

Q. 7. State what rent is paid for the store occupied by you, and also for the one adjoining.

A. I cannot say as regards the one adjoining, because Mr. Boteler, a year ago, made a special arrangement, of which I knew nothing; but it appears to me that formerly he paid thirty-five hundred dollars. My rent is twenty-five hundred dollars. Recently another arrangement has been made, the details of which I do not know. As to the property and buildings described in the bill of

complaint, I am not certain as to the revenue derived from them. The two houses on Eighth street formerly rented for thirty-five dollars.

Q. 8. What, if any, change was made in the management of her property by Mrs. Hitz after the failure of the German-American Bank, so far as you know?

36 A. After that, she assumed the collection of the rents herself. So far as I know, everything was turned over to her.

Q. 9. Who acted as her agent?

A. A man by the name of John Sherman.

Q. 10. State fully and carefully the circumstances attending the execution of the deed from John Hitz and wife, referred to in the the bill of complaint dated December 9, 1878, a copy of which is filed with the bill and marked "N. M. B. Exhibit No. 2."

A. Mr. Walter Cox was at that time Mrs. Hitz's counsel, and Mrs. Hitz told me she asked Mr. Cox what, after Mr. Hitz's debts were all paid and if anything was left of her property, could be done to protect that so that it could not be touched at any future day for the debts which he might create. She stated that Mr. Cox advised her that she should get him to execute such a deed in her favor to a trustee, or to two trustees, friends of hers, and she asked me whether I would consent to act as such.

That occurred in my store a short time after the failure of the German-American Bank and before the debt was made.

I told her of course it was understood that that paper was not to go on record until all matters were settled, and she said Mr. Cox told her that the paper would not go on record until all present claims against Mr. Hitz had been settled up.

That was before the paper was executed. I then went to Mr. Cox's house with her, and Mr. Cox then said that that paper would have no effect and would create a very bad impression if it was placed on record; that it could not be of any effect, but that it was an excellent thing for the future.

Upon that the paper was executed and delivered to me and was in my possession.

(Testimony as to what Mr. Cox said as to the purpose of this deed, and why it was executed, is objected to by Mr. Totten as irrelevant. The deed itself will speak for itself.)

Witness continues—

I held that deed to be placed on record as soon as all matters in connection with the indebtedness of Mr. Hitz to the German-American Bank had been settled.

37 A short time after that Mrs. Hitz requested me to purchase for her a box wherein she could put her papers, to be placed in the bank.

She then brought me her papers. I bought a box, and she then brought me her papers, and I put this deed amongst the other

papers in that box, thinking that inasmuch as she, at that time, did not do anything without my advice, she would make no use of it until I had been told or would get information of it, as I considered the deed in my possession and as it was only placed in that box for safe-keeping. I then deposited the box in the bank. I cannot remember when I put it in the box; it was some time after it came into my possession.

Q. 11. What occurred next in reference to the deed?

A. One day Mr. Cross came into my store and reminded me of the circumstances under which I obtained his consent to go on that deed as one of the trustees, and he told me he had been informed at the City Hall that that deed had been placed on record, whereupon I first called on Col. Totten, but did not find him in. I then requested Mr. Cross to go down and ask Mrs. Hitz how she came to get in this matter, inasmuch as she knew under what circumstances that deed was obtained.

Q. 12. Did he see Mrs. Hitz?

A. Mr. Cross went to see her, but I do not know what occurred, except what Mr. Cross said. The next thing I heard was that Col. Totten called upon me and explained the matter—how and why it was done.

Q. 13. What did he say to you?

(Col. Totten objects to the question.)

A. I do not remember exactly the words of the conversation. I stated to Col. Totten the circumstances under which the paper was obtained, and he said of course he was not aware of anything of that kind; that he had asked Mrs. Hitz if such a paper was executed, and she told him that such a paper was already executed, and he told her to get it, and he had it placed on record.

Q. 14. Did you have any conversation with Mr. or Mrs. Hitz on the subject before you filed the paper that is in evidence marked "N. M. B. No. 3"?

A. After Col. Totten called upon me Mrs. Hitz came to see me. She admitted that she had done wrong in not informing me of this matter, but she said she had not thought there was anything important in it.

38 Q. 15. Did you then remind her of the circumstances under which it was executed?

A. I did so.

Q. 16. What did she reply?

A. She said she did not understand it in that light.

Col. Totten: She denied it was an escrow?

Mr. Metzerott: No; she did not deny it, but she said she did not think she was doing anything wrong in giving you the paper. She could not have denied that, because she delivered the paper to me herself.

Q. 17. (By Mr. Wilson.) Did she state by whom the paper had been put on record?

A. By her attorney.

Q. 18. Did she state what information she gave her attorney as to the circumstances under which she obtained the paper?

A. I do not think she did; I do not remember exactly whether or not there was anything said on that point.

Q. 19. Then the original of the caveat, which is marked "N. M. B. No. 3," was recorded on the 26th May, 1879?

A. I suppose it was about that time.

Q. 20. State what, if any, consent you gave at any time to the filing of that deed of trust to you and Cross for record?

A. I never gave any consent, but it was filed contrary to my desire and to my agreement.

Q. 21. State when and how you in any way accepted the trust and duties imposed upon you by that deed of trust, and upon what conditions?

A. The conditions were, that I was to accept the trusteeship of this deed of trust as soon as all the claims existing then against Mr. Hitz had been settled, and if any property was left, this paper was to protect it.

(Answer objected to, and question also, as improper and irrelevant).

Q. 22. Did you ever accept the deed of trust in any other way, or upon any other conditions than upon those you have stated?

A. No, sir.

Q. 23. What, if any, authority did you ever give for the use of your name as trustee for any conditions other than those you have stated?

39 A. I never gave any other authority in any shape or form.

Q. 24. Who were present at the time said deed of trust was executed and placed in your possession?

A. I cannot tell when that deed was executed; I was not present; but the deed was delivered to me in my store by Mrs. Hitz.

Q. 25. State whether, at any time, any contingency occurred, or conditions of your acceptance were performed, so as to fulfill the conditions upon which you accepted the trust?

A. Nothing has occurred to fulfill the conditions.

Cross-examination by Mr. Totten:

Cross-Q. 1. Are you a director of the plaintiff in this case?

A. Yes, sir.

Cross-Q. 2. How long have you been a director?

A. I cannot tell exactly; I think about 11 years.

Cross-Q. 3. Were you present when this deed of trust was executed and delivered to Mrs. Hitz?

A. No, sir.

Cross-Q. 4. Do you know where it was done—where it was made?

A. No, sir.

Cross-Q. 5. How long after its date was it when you got it?

A. I cannot tell.

Cross-Q. 6. You have always kept Mrs. Hitz's valuable papers?

A. Only this one.

Cross-Q. 7. None others?

A. No, sir.

Cross-Q. 8. You had some of her bonds once, did you not?

A. I had some of her bonds once, some years ago, when I was acting for Hitz during his absence in Europe.

Cross-Q. 9. She was in the habit of advising with you about matters?

A. At the time the bank was started I cautioned Mrs. Hitz, and tried to prevail upon her to keep Mr. Hitz from going into such a dangerous concern.

40 Cross-Q. 10. Did Mrs. Hitz request you to buy this box for her?

A. Yes, sir.

Cross-Q. 11. How long did it take you to get the box?

A. She requested me to buy the box for other papers that she had. This paper was in my possession, and was not to go out of my hands.

Cross-Q. 12. I asked you if she asked you to get the box at the time she gave you this paper?

A. I rather think it was some time afterwards.

Cross-Q. 13. How long afterwards?

A. That I cannot remember. She asked me several times to get the box, and I looked around, but couldn't find a suitable one.

Cross-Q. 14. What did she want with the box?

A. She wanted it for the purpose of preserving papers she had.

Cross-Q. 15. Did she expect to leave it with you in your safe?

A. No, sir; she expected to leave it at the Bank of the Metropolis.

Cross-Q. 16. Did you give her the deed again?

A. No, sir; I never gave her the deed. I put it into the box, locked it, and gave her the key, and put the box into the Bank of the Metropolis.

Cross-Q. 17. How did she get the box?

A. She took the key and went up there and demanded the box of the cashier, and got it.

Cross-Q. 18. Was her name on the box?

A. Yes, sir; I put it on there for her.

Cross-Q. 19. You were not present when she obtained possession of this box?

A. No, sir.

Cross-Q. 20. You do not know what has been put into the box since then?

A. No, sir.

Cross-Q. 21. Have you ever had anything to do with it since?

A. No, sir.

Cross-Q. 22. It was subject to her order after you delivered it to the bank?

A. Yer, sir.

41 Cross-Q. 23. Who made this agreement that this deed should not be recorded?

A. Mr. Cox, her attorney, and she herself.

Cross-Q. 24. Where?

A. At Mr. Cox's office.

Cross-Q. 25. Had you any interest in this matter?

A. None whatever.

Cross-Q. 26. You simply acted for her protection?

A. Yes, sir.

Cross-Q. 27. Why was Cross put in?

A. Because Mr. Cox said there should be two persons, and she first suggested Mr. Lewis Davis. His name was first suggested to me.

Cross-Q. 28. How many conversations did you have with Mr. Cox about this?

A. Well, I cannot exactly remember. I remember one distinctly, but I think we had more than one conversation about it.

Cross-Q. 29. Were you present at any of the conversations when Mr. and Mrs. Hitz and Mr. Cox discussed the question of protecting the title of what is known as the Hatch property?

A. No, sir.

Cross-Q. 30. Do you know whether Mrs. Hitz declined very emphatically to sign any conveyance or consummate any conveyance for her husband unless he would execute this deed?

A. Only so far as she told me so herself.

Cross-Q. 31. When did she tell you?

A. Just about the time the paper was being executed.

Cross-Q. 32. Before she delivered it to you?

A. Yes, sir.

Cross-Q. 33. Did you not advise her that she should be protected before she conveyed away any of her property?

A. No, sir. If you ask me whether I did not advise her not to do anything without consulting her lawyer, I should say that I did so advise her. I told her that she should not do anything without consulting her lawyer on the subject. That I have done in many cases.

Cross-Q. 34. Did you not advise her at that time not to yield up any more of her rights for the benefit of her husband by executing papers?

42 A. It seems to me, of course I cannot say exactly, that I advised her not to execute a paper, but I told her not to do anything without consulting Mr. Cox, her attorney. Very often I went up to see Mr. Cox to consult with him about this subject. In

regards to this particular paper, I cannot say anything more than she told me herself.

Cross-Q. 35. What good did you expect Mrs. Hitz to reap from this paper if it should not be recorded?

A. She came to me and stated she had just come from Mr. Cox, and said she asked him this question: "Now suppose Mr. Hitz's debts are all paid to-day, how am I to be protected in my property and any property I might have in the future?" "He told me to get a paper," just such a one as has been executed, for her protection hereafter; for if Mr. Hitz were to go into debt again, if this was settled it would protect her. And this paper was executed solely for that purpose.

Cross-Q. 36. That is what she said?

A. Yes.

Cross-Q. 37. When did she say that?

A. On the day she requested me to become one of the trustees.

Cross-Q. 38. How long was that before the date of this paper?

A. Some days; maybe weeks. I cannot exactly tell.

Cross-Q. 39. Where did the conversation occur?

A. In my store.

Cross-Q. 40. Was anybody present?

A. No, sir.

At this hour (five o'clock) Colonel Totten gave notice that he would for the present close his cross-examination, but might in all probability, after reading over the deposition, desire to renew the same, and reserved that right.

B. ZEVELY, *Examiner.*

Redirect by Mr. Wilson:

Redirect Q. 1. Mrs. Hitz is a large stockholder in the National Metropolitan Bank, is she not?

A. I do not know that she is a large stockholder.

Adjourned to Thursday, January 22, 1880, 2 o'clock P. M.

W. G. METZEROTT.

43 Subscribed and sworn to before me this 11th day of March, 1880.

BERTRAM ZEVELY,
U. S. Commissioner, D. C.

Second Day—January 22, 1880.

Owing to engagements of counsel, the examination noted for this day was postponed to Monday, January 26, 1880.

Third Day—January 26, 1880.

Pursuant to notice and adjournment, met at the office of Nathaniel Wilson, 635 F street.

Present: Nathaniel Wilson, Esq., solicitor for complainant, and Enoch Totten, Esq., solicitor for defendants, Hitz and wife, and witness Samuel Cross, Esq., who, being first duly sworn, deposed and said: I am of lawful age, and a resident of the District of Columbia.

By Mr. Wilson:

Question 1. Are you the Samuel Cross named as trustee in the deed from John Hitz and wife dated the 9th day of December, 1878, and in the caveat executed on the 26th day of May, 1879, certified copies of which are marked Exhibits N. M. B. Nos. 2 and 3?

Answer. Yes, sir; I am.

Q. 2. After the 9th day of December, 1878, did you call on the defendant, Jane C. Hitz, with reference to the deed of trust in which your name occurred as trustee; if so, what occurred?

A. Yes, sir; I called on Mrs. Hitz; I do not know exactly the date; it was some time in December. I called on her in the afternoon, and had a talk with her about this paper, the deed of trust. I said to her that she had recorded that paper making Mr. Metzerott and myself her trustees; but that I thought it was distinctly understood that that paper was not to be made a matter of record until Mr. Hitz cleared up all his trouble with the German Bank. She said she had put it on record; that she had the paper, and her counsel had told her she should have some paper of the sort,
44 and she told him she had it already, and thereupon had it recorded, or it was recorded for her; I do not remember exactly the wording of that.

Q. 3. What did she say concerning Mr. Metzerott?

A. Well, I said to her, "Mr. Metzerott asked me to come up here this evening and ask you about this matter, and to say that he was very indignant indeed, because the understanding was that this paper was not to go on record." She said she was very sorry indeed that it was so. That is the substance of what occurred that evening in relation to that paper.

Q. 4. Was that the only interview you had with her on the subject?

A. Yes, sir.

Q. 4½. State what acceptance you ever made of the trust imposed upon you by that paper, and what, if any, consent you ever gave to being trustee or assuming the duties of trustee in respect of the trust mentioned in that paper?

A. Mr. Metzerott came to me some months before that—after the trouble in the bank—and stated that Mrs. Hitz had made the suggestion that she wanted her property placed in the hands of trustees, and he suggested my name in connection with his, with the distinct understanding that this paper was not to be used as a matter of record until all this trouble should be cleared up.

Q. 5. What did you say to that?

A. With that understanding I agreed to it.

Q. 6. What, if any, consent or direction did you give as to its being put on record?

(Mr. Totten objects to the question as immaterial, because it is none of Mr. Cross' business whether it is put on record or not.)

A. I gave none.

Q. 7. Did you ever see it in Mr. Metzerott's hands or possession?

A. I never saw the paper at all.

Q. 8. At any time; to this day?

A. No, sir; I have never seen it.

Cross-examination by Mr. Totten:

Cross-Q. 1. Have you any interest in the National Metropolitan Bank?

A. No, sir.

Cross-Q. 2. Have you any interest in this controversy?

45 A. No, sir.

Cross-Q. 3. You would have been perfectly willing to have acted as her trustee, would you not?

A. That is doubtful.

Cross-Q. 4. Why?

A. I will tell you the reason I did so in this matter. I have known Mr. Metzerott long and intimately as a square, upright man. He came to me and informed me that he had suggested it, and signified his desire to have me act, and really more to please him I consented. It is doubtful if Mrs. Hitz had asked me whether I would have agreed to it.

Cross-Q. 5. Had you any objection to acting as trustee to this particular deed?

A. I can't say that I had. I did not give it much thought when it was suggested to me.

Cross-Q. 6. Your hesitation now is caused by Mr. Metzerott's feelings on the subject?

A. No; I cannot say that. After my interview with Mrs. Hitz I took a different view of things from what I had before.

Cross-Q. 7. The deed never was delivered to you?

A. No, sir.

Cross-Q. 8. So far as any arrangement or understanding which may have taken place before the delivery of the deed is concerned, you are a stranger?

A. Yes, sir.

Cross-Q. 9. All the information you have about the facts, you got from Mr. Metzerott's statements?

A. Yes, sir.

Cross-Q. 10. How came you to sign that paper that was put on record afterwards?

A. The paper of Mr. Johnson?

Cross-Q. 11. Yes. How came you to sign that?

A. I did it because of our former understanding.

Cross-Q. 12. You did it because Mr. Metzerott asked you to?

A. Well, no; I do not know that I should have made any more about it. I was very well satisfied to sign it.

Cross-Q. 3. If Metzerott had not made a fuss about it, you would not have done anything about it?

A. If you will allow me, I will qualify my statement. Mr.
46 Metzerott came in to see me one afternoon, and I said I thought it was understood that that paper was not to be made a matter of record until Mr. Hitz's matters were settled. I told him further that Mr. Shayer had stopped me and—

Mr. Totten, interrupting: Never mind what Shayer said.

Witness continues:

—asked me what in the devil we fellows were trying to do to defraud this community in this Hitz affair. It was new to me. Metzerott came in, and I said I thought it was understood that this paper was not to go on record; he said that was the understanding, and became very indignant, indeed, at what I told him; went out at once, and when he came back was very much excited, and said: "Now, Sam, I do not want you to think I have got you in any difficulty. It was distinctly understood that it was not to be put on record, and I feel very much grieved about it." He said further that he would go at once to his counsel and have a paper prepared for us to sign.

Cross-Q. 13. Did he say anything to you at that time about how the officers of the bank would take this action?

A. I do not know that it was mentioned.

Cross-Q. 14. His excitement was occasioned by the fact that there was excitement in the community about the savings bank?

A. I do nat know whether it was caused by that or his idea that I would think he had taken advantage of me.

Cross-Q. 15. Who is Mr. Shayer?

A. Deputy recorder of deeds.

Cross-Q. 16. Is he interested in this matter in any way?

A. Not that I know of.

Cross-Q. 17. He was officiously intruding his nose into other people's business?

A. No; I no not think so.

Cross-Q. 18. Did you have that caveat of yourself and Mr. Metzerott recorded? Did you or did some other person?

A. Some other person.

Cross-Q. 19. How came you to sign that paper?

A. It was understood the evening before that such a paper would be prepared, and that he would have it done at his expense. He paid for it, I presume; no bill has ever been presented to me.

SAM. CROSS.

Subscribed and sworn to before me this 10th day of March, 1880.

BERTRAM ZEVELY,
U. S. Com'r, D. C.

District of Columbia:

I, Bertram Zevely, an examiner in chancery and United States commissioner in and for the District of Columbia, duly appointed by the Supreme Court of said District, do hereby certify that the foregoing depositions were taken down and reduced to writing by me in the presence of and from the statements of the witnesses at the times and place designated by me in the caption, and were by me read over to said witnesses and by them subscribed in my presence.

I further certify that I was attended by counsel of both parties respectively, and the witnesses were first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for either of the parties in said cause, or in any way interested therein.

BERTRAM ZEVELY,
Examiner in Chancery and U. S. Commissioner in and for the District of Columbia.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK *vs.* JOHN HITZ, JANE C. HITZ, WM. G. METZEROTT, and SAMUEL CROSS.	Equity. No. 6822.

Be it remembered that an examination of witnesses begun and held on the 9th day of July, 1880, and continued from day to day until concluded, the within depositions of John Hitz, Jane C. Hitz, and Benjamin U, Keyser were taken, at which time I, Bertram Zevely, an examiner in chancery and United States commissioner, did cause to be personally present before me, in the city of Washington, D. C., the within-named witnesses, to testify in behalf of defendant in a certain cause now pending in the Supreme
48 Court of the District of Columbia, wherein the National Metropolitan Bank is complainant and John Hitz et al. are defendants, being equity cause No. 6822.

And the said witnesses were first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause. And the said depositions were first read over to the witnesses, and by them subscribed and sworn to in my presence.

I further certify that I am not of counsel for either of the parties to said cause, or in any way interested therein.

[SEAL.] BERTRAM ZEVELY,
Examiner in Chancery and U. S. Commissioner, District of Columbia.

Mr. John Hitz, being first duly sworn, was examined by Mr. Totten, solicitor for Jane C. Hitz.

Q. 1. Are you one of the defendants in this case?

A. I am.

Q. 2. Were you a defendant in the suit at law instituted by the National Metropolitan Bank against John Hitz, Mattingly, Donaldson, and Prentiss on their promissory note?

A. I was.

Q. 3. What was that note given for?

A. Money paid at the bank for the use of the German-American National Bank.

Q. 4. Did the debt originate at the date of that note?

A. Yes, sir.

Q. 5. The debt for which the note was given?

A. Yes, sir.

Q. 6. It was the original transaction?

A. Yes, sir.

Q. 7. Who are the makers of that note?

A. Myself, William F. Mattingly, and R. B. Donaldson.

Q. 8. Payable to the order of Charles E. Prentiss?

A. Yes, sir.

Q. 9. Where was the money obtained?

A. At the National Metropolitan Bank.

Q. 10. Who obtained it?

A. I did.

Q. 11. What was done with the money?

A. Delivered to the cashier of the German-American National Bank.

49 Q. 12. Did it go into the funds of that bank?

A. I should say it did.

Q. 13. You know it did.

A. It was delivered to the cashier.

Q. 14. It was obtained for the purposes of that bank?

A. It was.

Q. 15. Have you any personal interest in the affairs of that bank other than as an officer and stockholder?

A. I have not.

Q. 16. What relation to the bank is maintained by the other parties to that note?

A. They stood in the same relation that I did, one of the directors.

Q. 17. Who were the officers of that bank at that date?

A. Myself, president; Charles E. Prentiss, cashier; R. B. Donaldson, vice-president; William F. Mattingly, secretary.

Q. 18. This note was dated on the 14th day of October, was it not?

A. Yes, sir.

Q. 19. Eighteen hundred and seventy-eight.

A. Yes, sir.

Q. 20. The bank failed on what day?

A. On the 30th the bank closed.

Q. 21. Did you make any defense to this note?

A. No, sir.

Q. 22. Did the other parties make any defense?

A. I could not say; I believe they did, though.

Q. 23. Do you know whether Mr. Mattingly is solvent or not?

(Mr. Wilson, solicitor for complainant, objects to the question as immaterial and irrelevant.)

A. I am not able to say; I presume he is solvent.

(Answer objected to.)

Q. 24. Do you know whether Mr. Donaldson is solvent or not?

(Objected to for the same reason as given in question 23.)

A. I give the same answer in this case.

(Same objection.)

Q. 25. Is the defendant Jane C. Hitz your wife?

A. She is.

Q. 26. When were you married to her?

A. In 1856.

50 Q. 27. The 5th day of August, was it not?

A. Yes, sir.

Q. 28. You have lived together ever since?

A. Yes, sir.

Q. 29. How many children have you?

A. We have two children living.

Q. 30. What are their names?

A. Gertrude and William Henry.

Q. 31. Can you give their ages?

A. Gertrude is 18; William Henry 8.

Q. 32. When you married Mrs. Hitz, Mr. Hitz, what was your condition financially? Were you the owner of any real estate or other property of any kind?

(Question objected to.)

A. No, sir; I owned no real estate in my own name.

Q. 33. I wish you would state with as much accuracy as possible your financial condition at that time.

A. I had no real estate and a very small amount of personal estate.

Q. 34. Can you state how much personalty you had in value?

A. I could not state exactly; some several hundred dollars.

Q. 35. Can you state, generally, how much personal property in value Mrs. Hitz inherited from her father?

A. Personal?

Q. 36. Yes.

(All the foregoing is objected to by Mr. Wilson.)

A. She inherited upwards of $60,000.

Q. 37. This was all personal property?

A. Personal property.

Q. 38. Now, can you state how much realty was left by her father at the time of his death?

A. I could not state exactly; somewhere, I think, in the neighborhood of $100,000.

Q. 39. Was there not more than that?

A. It may have been more. I cannot depend upon my memory.

Q. 40. What was its condition as to incumbrances?

A. It had no incumbrances.

Q. 41. Any taxes unpaid?

A. There may have been taxes unpaid for the current year at the time.

51 Q. 42. What was the name of Mrs. Hitz's father?

A. Mr. Shanks.

Q. 43. Can you give the date of his death?

A. He died in 1864; in May, I think.

Q. 44. Did he leave a widow?

A. He did.

Q. 45. What was her name?

A. Catherine N. Shanks.

Q. 46. Was she the mother of Mrs. Hitz?

A. She was.

Q. 47. Did Mr. Shanks leave a will?

A. Not that I know of.

Q. 48. You know he did not?

A. I know he did not. I have never heard of any.

Q. 49. Can you state when Mrs. Shanks died?

A. She died in 1879.

Q. 50. Where did Mr. Shanks live at the time of his death?

A. On F street, near Seventh street. Do not know the number.

Q. 51. How long did he live in the city of Washington? Do you know that?

A. I do not. He was a native, I think, of Georgetown. I am not positive though.

Q. 52. What became of Mrs. Shanks' dower in her husband's estate?

A. It was paid to her after the amount had been settled upon annually.

Q. 53. By whom?

A. By myself.

Q. 54. What was the amount that you paid?

A. It was $2,000.

Q. 55. Annually?

A. Yes; annually.

Q. 56. Did you pay it to her regularly up to the time of her death?

A. Yes; she was paid regularly up to the time of her death.

Q. 57. It was paid out of the estate which came to Mrs. Hitz?

A. Yes, sir.

Q. 58. Was that amount settled upon her in lieu of her dower interest as an annual payment?

52 A. There was an amicable suit which, I think, settled the amount of dower; and in order to relieve Mrs. Shanks of having any uncertainty as to the amount that was to be paid her, this amount was fixed upon. About that time taxes were increasing and repairs, and she felt that the income was not certain and she wanted to have it fixed, and there was this amicable suit. Mr. Cox was the auditor in the matter, and this amount was fixed as being an equitable amount to be paid to her annually.

Q. 59. In what month did Mrs. Shanks die?

A. In the month of January, as well as I can state without referring to any memorandum.

Q. 60. What has become of the personal property that came to Mrs. Hitz through her father? Did any of it come into your possession?

A. It all went through my hands.

Q. 61. What has become of it? Is any of it now left?

A. No, sir.

Q. 62. Were you indebted to any extent prior to your connection with the German-American National Bank?

A. I was in debt, but not beyond my ability to pay.

Q. 63. Then your debts before your connection with that bank were trifling, were they?

A. They did not exceed the sum of $20,000.

Q. 64. Were you able to pay all that?

A. I was that, and in my own right, too.

Q. 65. When was the German-American National Bank organized?

A. In 1873, I think.

Q. 66. You are speaking now of the German-American Savings Bank?

A. Yes, that was organized in 1873.

Q. 67. That continued the savings bank, but was subsequently changed. Can you give the date of that change?

A. It was, I think, in 1877. (Referring to his memoranda:) It was in May, 1877.

Q. 68. Were you president of the German-American Savings Bank during its existence?

A. I was.

Q. 69. Were you president all of the life of the German-American National Bank?

A. I was.

Q. 70. Can you state the amount of the obligations held
53 by the receiver of the National Bank against you at the time of the failure of the bank, generally? I do not care that you should be accurate.

(All the foregoing objected to as immaterial.)

A. The amount that the receiver claimed was in the neighborhood of $80,000.

Q. 71. Did all of that indebtedness, either real or apparent, arise out of the transactions of that bank exclusively?

A. By far the greater portion of it.

Q. 72. Was that indebtedness in addition to your indebtedness, if there be any, as a stockholder?

A. No, sir; that includes it.

Q. 73. That includes your liability as a stockholder, $80,000, does it?

A. Yes; that includes all liabilities.

Q. 74. Can you state what became of Mrs. Hitz's personalty, which came to you from her father's estate, in a general way?

A. It was largely absorbed in repairing and improving the real estate that was left her, and partially also in traveling.

Q. 75. Was there any property in real estate bought from the proceeds or sales of personal property by you?

A. There may have been some property bought, but if so I held subsequently property of my own which was equal to that amount.

Q. 76. Was the property on the corner of Pennsylvania avenue and Sixth street S. E. bought with the money realized from the sale of any of her personal property, either in whole or in part?

A. I am unable to state at the present time. At that time I had control of considerable additional money, and it is possible—not only possible but probable—that some of that money went in there

Q. 78. Did Mrs. Hitz own property on the corner of Ninth and G streets?

A. Yes.

Q. 79. What was the value of that property in 1871?

A. About $30,000.

Q. 80. What became of that property?

A. It was subsequently mortgaged.

54 Q. 81. It has become involved in litigation, has it not?

A. It is at present.

Q. 82. This has actually been conveyed away by her, has it not?

A. It has.

Q. 83. And subsequently been mortgaged by the transferee?

A. Yes, sir. It was first mortgaged by her, afterwards conveyed, I believe, and then mortgaged by the one conveyed to.

Q. 85. And all those conveyances are now assailed by her, are they not?

A. I believe so.

Q. 86. She had at the time of her father's death a large quantity of stock in the National Bank of the Metropolis, which was subsequently converted into the National Metropolitan Bank?

A. Yes, sir.

Q. 87. What became of that stock?

A. The stock that was inherited by her was partially sold, a portion of it having been conveyed to trustees.

Q. 88. Now, about how much of it did she inherit which was not in the names of trustees?

A. I am unable to say, but I think upwards of $10,000.

Q. 89. Now, what became of that?

A. That was used, as I heretofore stated, in improving property and partially in travelling.

Q. 90. Did any of it go into the German-American National or Savings Bank?

A. No, sir; the stock that went into that bank was stock I purchased myself.

Q. 91. With your own funds?

A. No, sir.

Q. 92. Then she had nothing to do with that?

A. Nothing.

Q. 93. Did any of the proceeds of that stock go into the property on Capitol Hill?

A. I could not say.

Q. 94. What do you say? Is it probable that a part of it went into that real estate?

A. It is barely possible that some of it may have gone in there. The property on Capitol Hill was not purchased at one and the same time. It was purchased at different times. It would be impossible to state exactly where the money came from that was applied to its purchase.

Q. 95. You speak of some of this money being expended in travelling expenses. By whom was it expended in travelling expenses?

A. Myself.

Q. 96. Were you accustomed to visit Europe every year?

A. I visited Europe, if not every year, every two or three years. Mrs. Hitz spent longer periods there than I did.

Q. 97. When Mr. Shanks (Mrs. Hitz's father) died, what became of the property, real and personal? I want you to state what control you had of it so far as you had control of it, and in what capacity and in what way you dealt with it; whether you kept separate accounts of her property as distinct from your own, or not.

A. I treated it as separate property always. The taxes were always paid from the Shanks property. I endeavored to keep the expenses separate.

Q. 98. What did Mrs. Hitz do in regard to the management of her estate?

A. She left it to me.

Q. 99. Did you control the property as your own or as her own?

A. I always looked upon myself as her agent and had the right by courtesy to control it and so long as she made no interference. She was not a person who was fond of dealing with property, and I presumed would want to have somebody to take it off her hands.

Q. 100. Can you enumerate the different pieces of property which Mr. Shanks left at his death and their location, generally?

A. I think I can.

Q. 101. Please do so.

A. One piece of property corner Eighteenth and E streets northwest.

Q. 102. About how much was it worth?

A. I am unable to state.

Q. 103. Go on and locate these various pieces of property. You may state, as you go on, the improvements upon them, if any.

56 A. The improvement on the first piece I named consisted of a two (2) story brick in a very dilapidated condition. She was also possessed of property corner of Ninth and G streets and the adjoining lot on G street. The adjoining lot had two substantial houses very well built.

Q. 104. That was the piece of property you told us a little while ago was worth $30,000?

A. Yes, sir. The corner property at that time was valueless. There were two houses on Eighth street, occupied as tenements, also in a very dilapidated condition. There was a valuable piece of property on the avenue, between Ninth and Tenth streets, which had on it a building with an iron front.

Q. 105. That is the property known as the Metzerott building, occupied by Metzerott and Boteler?

A. Yes, sir; but was so constructed as to make it yield a comparatively small sum as regards the value of the location; and another piece of property on the avenue, corner Jackson Hall alley—Pennsylvania avenue.

Q. 106. That is the property known as the New York Restaurant?

A. Yes, sir.

Q. 107. How much was that worth?

A. At that time $5,000 or $6,000. It was in a very bad condition. There was a piece of property on Eleventh street held, under a privilege to purchase, under a lease, at that time by Samuel Peugh, which passed through various stages of litigation, and was finally awarded to the claimant upon his paying a certain amount of money for it—I think $4,000.

Q. 108. Did he pay it?

A. I think so, sir.

Q. 109. Was the money paid over to you?

A. I believe it was.

Q. 110. She also had a piece of property on the corner of Eighteenth and New York avenue?

A. That is the same property before mentioned at Eighteenth and E. The streets come together there.

Q. 111. You stated she had some property on H street. Do you mean that?

A. No, sir; Eighth street, I said.

Q. 112. Was that all the property he left that you are aware of?

57 A. There was a piece of property on F street near Seventh.

Q. 113. That is now owned by this National Bank?

A. Yes, sir.

Q. 114. It was not the corner?

A. No, sir; it was one of the smaller houses at the back; four houses, I think, from the corner.

Q. 115. That was subsequently disposed of to the bank?

A. Yes, sir.

Q. 116. How much of this property is remaining in the name of Shanks for her?

A. Property corner E and Eighteenth streets, that on Eighth street, and the property on Pennsylvania avenue between Ninth and Tenth streets.

Q. 117. The New York Restaurant and property corner Ninth and G streets are gone?

A. I have not finished; and an equitable interest in the property corner Ninth and G streets.

Q. 118. Mr. Hitz, I now show you the original of a deed made by you and your wife, bearing date December 9, 1878, and which was recorded on the 13th day of May, 1879, a copy of which is, with the plaintiff's testimony, marked "N. M. B. Exhibit No. X." State if that is your signature and your wife's signature?

A. Yes, sir; that is my signature and my wife's.

Q. 119. When was that deed made?

A. It was made at the time of its date.

Q. 120. Will you state for what purpose that deed was made?

(Mr. Wilson objects to the question as immaterial and incompetent.)

A. The purpose is stated in the deed.

Q. 121. Now, will you state upon what consideration and under what circumstances that conveyance was made?

(Objected to as incompetent to prove consideration by parol testimony.)

Mr. Totten, continuing: State, in the first place, the consideration.

A. The consideration was an obligation on her part that she

would sign a conveyance of the property on Pennsylvania avenue, corner of Jackson Hall alley.

(Answer objected to for the same reason.)

58 Q. 122. That is the property which is called the New York Restaurant property?

A. Yes, sir.

Q. 123. Now what was the bargain about that?

A. I refused to sign this deed unless she completed the conveyance which I supposed had been signed by her.

Q. 124. Upon your understanding, state what that conveyance was, and the nature of it.

A. The conveyance was of this property that I have referred to, on Pennsylvania avenue, to secure an indebtedness to the German-American Savings Bank.

Q. 125. What was the amount of that indebtedness?

A. $15,000.

Q. 126. Who made the conveyance which you wanted to have corrected and perfected?

A. I made the conveyance.

Q. 127. Yourself?

A. Yes, sir.

Q. 128. To whom?

A. To trustees.

Q. 129. Who were they?

A. I think they were officers of the bank.

Q. 130. She did not sign the conveyance?

A. It appears that it was left unsigned for some reason I never could explain?

Q. 131. Where was she at the time you made the conveyance?

A. In Europe.

Q. 132. Did you send it to her for her signature?

A. Yes, I think I did.

Q. 133. Did you send her the original, or another one?

A. I think the original.

Q. 134. She never signed any conveyance?

A. Yes, sir.

Q. 135. How much money did the bank obtain on that conveyance which you made?

A. Eventually?

Q. 136. I mean at the time.

A. They obtained the amount the deed called for.

Q. 137. And that was $15,000.

A. Yes, sir; I obtained the money from the bank.

Q. 138. What did you do with the money?

A. I may have invested it in stock at the time.

59 Q. 139. Do you remember distinctly what you did with it?

A. No, sir.

Q. 140. Did you make a mortgage or deed of trust yourself, or did you convey it to somebody else?

A. I conveyed it to somebody else.
Q. 141. To whom?
A. To Mrs. Hatch.
Q. 142. What is her first name?
A. Cornelia.
Q. 143. What is her husband's name?
A. Horace.
Q. 144. What did they do with it?
A. They gave a mortgage.
Q. 145. Did they give a note also?
A. I presume they did.
Q. 146. Then the desire which you had at the time of this transaction about which we are talking, was that Mrs. Hitz should give her interest in order to perfect that title?
A. Yes, sir. I wanted to have the bank perfectly secured.
Q. 148. Was Mrs. Hitz willing to do that?
A. No, sir.
Q. 149. Well, what did she say and demand?
A. She demanded at the time that I should relinquish all control of her property hereafter, and to do it in a way in which there could be no misunderstanding about it.
Q. 150. What did she wish to accomplish;—get rid of your control, whatever that might be?
A. I think she wished to get rid of me as her agent.
Q. 151. Well, did she say anything about getting rid of your controlling interest in the property; such as you might have had or might assert by virtue of being her husband?
A. I do not remember anything of the kind, if she did. There may have been something. I had my own ideas about that at that time.
(Objected to by Mr. Wilson, upon grounds already stated.)
Q. 152. What were they?
A. I never claimed any controlling rights, then or previous thereto, to the title of the property.
Q. 153. Or the income?
A. The income went by courtesy.
60 Q. 154. What do you mean by that?
A. As long as she did not object to my collecting it.
Q. 155. When this deed was made, in whose possession was the property conveyed by that instrument—this deed of the 9th of December, 1878?
A. I controlled the property at that time.
Q. 156. Did you not surrender possession to her in November?
A. At that time?
Q. 157. Yes, sir.
A. I surrendered to her agent before that.
Q. 158. Did you relinquish your management of all her estate before this deed was made to her agent, Mr. Sherman?

A. I did.

Q. 159. John Sherman was her agent?

A. Yes, sir.

Q. 160. Who controls her property now?

A. I could not say.

Q. 161. Do you know whether John Sherman has had control of it since?

A. I believe he has had, but I am not certain.

Q. 161½. At the time this conveyance was made, December 9, 1878, did she execute the conveyance of the New York Restaurant property?

A. She did.

Q. 162. What became of the deed—was it put on record?

A. I believe it was.

Q. 163. Do you know to whom the deed was made?

A. I do not; but I believe to the officers of the bank.

Q. 164. Do you know the date of it?

A. It was about the same date as this deed. It may have been before or after, or on that very day. The deed was signed at the same time after I refused to sign this deed unless she signed that.

Q. 165. They were then practically made and delivered at the same time?

A. Yes, sir.

Q. 166. What was the value of the property conveyed by you at the time mentioned—the New-York avenue Restaurant property, on the corner of Jackson Hall alley and Pennsylvania avenue?

61 A. Sixteen or seventeen thousand dollars.

Q. 167. Was it worth as much as that at the time of this deed, December 9, 1878?

A. Yes, sir.

Q. 168. Has Mr. Keyser, the receiver of the bank, sold it, that you know of?

A. I understood that he sold it.

Q. 169. Did you have any conversation with Mr. Metzerott or Mr. Cross, the trustees named in this deed of December 9, 1878, to whom the property was conveyed for the benefit of Mrs. Hitz, and did you have any conversation with Mr. Metzerott, prior to the execution of that deed, about it?

A. I may have, though I do not remember.

Q. 170. Mr. Metzerott testifies that there was an agreement that the deed should not be put upon record, but that it should be held in escrow by him until your debts to the German-American National Bank were paid and settled. What do you know about any such understanding as that?

A. I was not a party to any understanding of the kind. I never was consulted by Mr. Metzerott or Mrs. Hitz.

Q. 171. You made the deed for the purpose of securing to Mrs. Hitz the property which she inherited from her father, and the bank got the benefit of your conveyance?

A. I made it for the benefit as therein stated. If any benefit was to be derived, she was entitled to it.

Q. 172. Then, so far as you are concerned, that deed was not to be held in escrow?

A. I was not consulted about it.

Q. 173. Were you invited to give your opinion about the trustees being satisfactory?

A. Yes; about the time the deed was executed.

Q. 174. And you said it was satisfactory?

A. Yes, sir.

Q. 175. And you made and delivered the deed?

A. Yes, sir.

Q. 176. Where was it made?

A. At Mr. Cox's office.

Q. 177. Did you sign it at the same time your wife did?

A. Yes, sir.

Q. 178. To whom was it given?

A. To Mr. Walter S. Cox, her counsel.

Q. 179. Whose counsel?

62 A. Mrs. Hitz's.

Q. 180. Did you ever see the deed after that until I showed it to you?

A. I never saw it.

Q. 181. Do you know anything of the circumstances of its being put upon record?

A. No; nothing until afterwards.

Q. 182. Did Mrs. Hitz, about the time of that conveyance, execute a deed of trust with you to Mr. Keyser for the benefit of the German-American National Bank?

A. Yes, sir.

Q. 183. What property was conveyed by that, do you remember,—in a general way?

A. Yes, sir; property standing in my own name.

Q. 184. Where located?

A. On Capitol Hill and Eighth street.

Q. 185. Was any of the property which had come to her from her father's estate conveyed by that deed?

A. About two (2) feet.

Q. 186. How much was that worth?

A. About two hundred dollars.

Q. 187. How long after or before this conveyance of the 9th of December, 1878, was that trust deed made by Mrs. Hitz?

A. The trust deed was made in November.

Q. 188. Then it was made before the conveyance?

A. Yes, sir.

Q. 189. Have you had anything to do with Mrs. Hitz's property, directly or indirectly, since you turned it over to Sherman, in November, 1878?

A. I have had nothing whatever to do do with it.

Cross-examination by Mr. Wilson:

Cross-Q. 1. What personal property does Mrs. Hitz now own?

A. I am unable to say, because the personal property consists mainly of property inherited from her mother.

Cross-Q. 2. State as near as you can?

A. I have no means of knowing.

Cross-Q. 3. Does she own any stock in the National Metropolitan Bank?

A. She does.

Cross-Q. 4. How much?

63 A. I am unable to say.

Cross-Q. 5. State as near as you can.

A. The only stock I can positively speak of, is stock that was left her by her father, which was held under a trust.

Cross-Q. 6. How much?

A. About $6,000. She has additional stock, but I am not aware how much, or to what amount.

Cross-Q. 7. Can you not state approximately?

A. No, sir; I cannot.

Cross-Q. 8. Ten thousand dollars?

A. Additional? I couldn't say.

Cross-Q. 9. Over five thousand?

A. I should think there was over five thousand, though I am not certain. I have no means of knowing. Mrs. Hitz never converses with me about her property.

Cross-Q. 10. That stock is a dividend-paying stock, is it not?

A. I believe it is.

Cross-Q. 11. Can you state any personal or real property from which Mrs. Hitz derives an income, which she now owns?

A. I know of no other personal property; still she may have some other without my knowledge.

Cross-Q. 12. And what other real estate?

A. The real estate I have mentioned. Shall I recall it?

Mr. Wilson: No, sir.

Cross-Q. 13. At the time of the deed of trust to Metzerott and Cross was executed—that is, on the 9th day of December, 1878—what was your pecuniary condition?

A. I was able to pay all indebtedness that I was really liable for.

Cross-Q. 14. Had you made any conveyances of your property?

A. I had made a conditional conveyance to Mr. Keyser.

Cross-Q. 15. To cover your indebtedness to the bank?

A. No, sir; to cover my indebtedness—which should be ascertained—as a stockholder.

Cross-Q. 16. Had you at that time any property which could be reached by execution at law?

A. Yes, sir.

Cross-Q. 17. Unincumbered?

A. Yes, sir.

64 Cross-Q. 18. What was it?

A. Property on Eighth street.

Cross-Q. 19. What became of that?

A. Included in the deed to Mr. Keyser.

Cross-Q. 20. When was that deed made?

A. In November, 1878.

Cross-Q. 21. I am speaking of this time (December, 1878).

A. No, sir; I had not at the time that deed was executed, December, 1878. I had made over my property conditionally to Mr. Keyser—real property; I had no personal property.

Cross-Q. 22. The deed of trust to which you refer is the deed from John Hitz and Jane Hitz to William F. Mattingly and C. E. Prentiss, executed the 18th day of December, 1878. Is that so?

A. Yes, sir; ten (10) days later.

(A copy of this deed is already in evidence, marked "Exhibit N. M. B. X.")

Cross-Q. 23. Why was the deed to Metzerott and Cross never put on record at once?

A. I am unable to say.

Cross-Q. 24. You had no conversation at all with Mr. Metzerott in regard to it?

A. None that I know of.

Cross-Q. 25. Neither before nor at the time it was executed?

A. At the time I saw very little of Mr. Metzerott; I never had any conversation with him about it.

Cross-Q. 26. Was it through your advice or at your suggestion that the deed was put on record?

A. I had nothing whatever to do with it.

Cross-Q. 27. It was not filed until after the judgment was obtained against you at the suit of the National Metropolitan Bank, was it?

A. I could not say; I do not remember when the suit was obtained.

Mr. Wilson: 28th of July?

A. I do not remember the date of recording the deed, as I was not consulted about it at all.

Redirect by Mr. Totten:

65 Redirect-Q. 1. When this deed was made, on the 9th day of December, 1878, were any suits pending against you?

A. No, sir.

Redirect-Q. 2. What was the first suit brought against you in consequence of your indebtedness to the bank or otherwise; was not this present suit of the National Metropolitan Bank the first one brought against you?

A. That was the first one brought to recover money under; there was another about that time, and another after that brought by Keyser.

Redirect-Q. 3. That was brought after the National Metropolitan Bank suit, was it not?

A. I do not know.

Redirect-Q. 4. There were no judgments of any kind against you for the payment of money when this deed was made, December 9, 1878.

A. No, sir.

Recross-examination by Mr. Wilson:

Recross-Q. 1. The note on which this judgment was obtained was then overdue?

A. Yes, sir.

Recross-Q. 2. And had been overdue for how long?

A. I could not say; the note was past due, that I know.

Recross-Q. 3. Had you been requested before that time to confess judgment?

A. That I do not remember; I lacked counsel about that time, until Mr. Webb became my counsel, and I had no means of defending myself in any way.

JOHN HITZ.

Subscribed and sworn to before me this 26th day of July, A. D. 1880.

BERTRAM ZEVELY,
Examiner in Chancery and U. S. Com'r, D. C.

Adjourned to Tuesday, July 13, 1880, 11 o'clock A. M.

Second Day—Tuesday, July 13, 1880, 11 A. M.

Met pursuant to adjournment.

Present: Mr. Totten, Mr. Wilson, and Mrs. Jane Hitz.

At the request of Mr. Totten, adjourned to Wednesday, July 14, 1880.

66 *Third Day—Wednesday, July* 14, 1880, 11 A. M.

There was no meeting. Colonel Totten sent word to Mr. Wilson that he desired the examination postponed to 2 o'clock, which was done.

BERTRAM ZEVELY, *Examiner.*

Fourth Day—Wednesday, July 14, 1880, 2 P. M.

Met pursuant adjournment. Present: Mr. Totten, Mr. Wilson, and Mrs. Jane C. Hitz.

Mrs. Jane C. Hitz, a witness produced for the defense, having been first duly sworn, deposes and says:

I reside in the District of Columbia; am of lawful age, and as a defendant to this suit have an interest therein.

By Mr. Totten:

Q. 1. Mrs. Hitz, what is your age?

A. Forty-three. Forty-two when I was last asked the question; now I am forty-three.

Q. 2. Are you the wife of John Hitz, the other defendant in this case?

A. Yes, sir.

Q. 3. When were you married to him?

A. The 5th day of August, 1856.

Q. 4. How many children have you?

A. I have two.

Q. 5. What are their names and ages respectively?

A. Anna Gertrude, 19; William Henry, 8 years.

Q 6. How many children have you had?

A. Have had five.

Q. 7. What was your father's name?

A. Michael Shanks.

Q. 8. Where did he live at the time of his death?

A. On F street near Seventh, in this city.

Q. 9. How long did he reside here?

A. All his life. He was born in Georgetown, but removed to Washington very early in life.

Q. 10. Where were you born?

A. In Washington.

Q. 11. When did your father, Michael Shanks, die?

A. In 1864.

Q. 12. Can you give the day?

67 A. I cannot give the day.

Q. 13. How many children did he have?

A. Only one.

Q. 14. Were you his sole heir at law?

A. Yes, sir; I was.

Q. 15. When he died, was your mother living?

A. Yes, sir.

Q. 16. What was her name?

A. Catherine N. Shanks.

Q. 17. How long did she live?

A. Until 1879. She died in January, 1879; the 26th of January.

Q. 18. Did she reside here during her widowhood?

A. Always.

Q. 19. She was not married the second time?

A. No, sir.

Q. 20. What interest did she get out of the estate left by your father?

A. One-third (⅓).

Q. 21. How did she get it; do you know? Was it paid to her in the shape of money, or was she given a portion of the property?

A. Well, she received at the settlement of the estate by the administrator stocks, and probably money too.

Q. 22. Did you or your husband pay her any money?

A. Yes, sir.

Q. 23. In lieu of dower during her life-time?

A. That was an after-arrangement.

Q. 24. Please to state about that. How much money did she get annually in lieu of her dower?

A. Twenty-nine hundred dollars ($2,900).

Q. 25. Per annum?

A. Yes, sir.

Q. 26. Was that paid to her up to the time of her death?

A. Yes, sir.

Q. 27. Do you know how much property your father left in the way of realty? If you can give a general description of each tract of land in the city of Washington, do so.

A. Well, he left a house and ground on the corner of Eighteenth and E streets northwest.

[Mr. Wilson came in at this point, and having the foregoing
68 read over to him, objects to it as immaterial and irrelevant, and gives notice that he shall move to strike it out.]

The witness continues—

There is a piece of property on Pennsylvania avenue between Ninth and Tenth streets, then known as the "Iron Hall," now known as "Metzerott's Hall." There are two houses on Eighth street northwest, between H and I, and there were three houses on G and Ninth streets, two on G street, and one on the corner of Ninth street and G. There was a house on F street near Seventh, where my father resided, and there was a house on Eleventh street between F and G, which had belonged to him; but I do not know exactly how that was settled; there was some law matter connected with it, and it afterwards passed out of my hands; that, I think, is all.

Q. 28. Can you give a general statement as to the value of that property at the time of your father's death? I mean the gross amount.

A. Well, only from what I have seen in various papers.

Q. 29. Have you an opinion about it of your own?

A. No; because I do not know the value.

Q. 30. How much of that property have you now?

A. I have the house on Eighteenth and E streets, the building on the Avenue between Ninth and Tenth streets, and two houses on Eighth street.

Q. 31. Are you in possession of these remaining tracts?

A. Yes, sir.

Q. 32. I mean personally.

A. Yes, sir; personally.

Q. 33. Mr. Hitz has nothing to do with them?

A. Nothing whatever.

Q. 34. Do you know how much personalty your father left? I want you to speak of the value of it; give me your general notion.

A. I only know the value of it from what I have been told and papers I have seen. Mr. Hitz estimated it at about $60,000, and I supposed it was something about that.

Q. 35. How much personal property is there left of that now?

A. So far as I know, none at all.

Q. 36. What became of it?

A. I cannot tell.

69 Q. 37. The bank stock was not all disposed of by Mr. Hitz, was it?

A. So far as I know it was, with the exception of some which he could not dispose of.

Q. 38. How much was that?

A. About $6,000.

Q. 39. He could not dispose of that because it was in the name of trustees?

A. It was in the name of trustees, and given to me to be independent of his control.

Q. 40. Have you still got that stock?

A. I have.

Q. 41. Who disposed of that personal estate?

A. I have been informed recently that Mr. Hitz did.

Q. 42. Did you dispose of any of it?

A. None at all.

Q. 43. Have you any idea what became of it?

A. I have not. I did not know that it had been disposed of until recently—by recently, I mean within a year.

Q. 44. In what manner was your father's estate managed after his death, and by whom?

A. It was managed by Mr. Hitz, after the administrator turned it over to him.

Q. 45. Did you have any control over it at all, or anything to do with its management?

A. I took very little part in the management of it.

Q. 46. How much of your time did you spend in Europe? Will you state how many visits you made to Europe?

A. I made three visits to Europe. I spent in all these three visits about five years.

Q. 47. Was Mr. Hitz with you on any of these visits?

A. Yes, sir.

Q. 48. How much time did he average in Europe?

A. Mr. Hitz has been in Europe more times than I have, but during those five years he was there perhaps half of the time.

Q. 49. How did your expenses while you were in Europe compare with your expenses while you were here, for the same length of time?

A. I should judge they were about the same.

70 Q. 50. Mr. Hitz says that this personal estate all went for the purpose of improving the realty and for trifling expenses. Do you know anything about that?

A. I know nothing about it. If it is so, I do not know anything about it.

Q. 51. Is all of this property that you have mentioned improved, and was it improved when he first took the management of it in hand?

A. Most of it was. There is some unimproved ground on Eighteenth and E streets, but there is a house and lot there.

Q. 52. The Metzerott building is the most valuable of all the tracts, is it not?

A. Yes, sir.

Q. 53. That is on Pennsylvania avenue, between Ninth and Tenth streets?

A. Yes, sir.

Q. 54. Was that improved by that iron building when Mr. Hitz got charge of it?

A. Yes, sir.

Q. 55. Did he collect the rents?

A. Yes, sir.

Q. 56. Have there ever been any improvements put on that property that you are aware of, of any kind?

A. No, sir. I think not.

Q. 57. Has any of the other property been improved? I speak of the property on Eighteenth and E street.

A. There has been considerable done to that, but not by Mr. Hitz, but by the man to whom the property was leased for a term of years. By the way, I find I have omitted a piece of property when I gave the list; that is, the New York House.

Q. 58. That is called the New York House, located on Pennsylvania avenue, near Jackson Hall alley?

A. Yes, sir.

Q. 59. Which was subsequently transferred to you?

A. Yes, sir.

Q. 60. Have you any idea of the income of your property per annum from 1864 to 1874? I want your general notion about the general income you usually collected.

A. I suppose the income must have averaged from five to six thousand dollars per annum during that period.

Q. 61. Can you state if it was not less than 5,000?

A. I am very certain it was not less than $5,000. It
71 was that at the time of my father's death. I do not think it was ever less. I do not see why it should be.

Q. 62. Have you ever made any effort to ascertain where this personal estate of your father's went to? And, if you have, what luck did you have?

A. The efforts that I have made were made through you mostly, and you know what the answers have been. It has been disposed of by Mr. Hitz in improving and repairing the property, and for travelling. I have made some efforts to get information about it myself, but never with much success. I did not know until recently—until after the failure of the German-American Bank—that the personalty was gone.

Q. 63. Then you found it out in what way?

A. I think I first found it out through testimony given by Mr. Hitz in a different case, which had sprung out of the failure of the bank. I think that is the first information I had of it. I did not ask about it, because I did not know there was any reason why I should ask about it.

Q. 64. When did you resume possession and control of your property personally?

A. I think in November, 1878.

Q. 65. Did Mr. Hitz turn it over to you then?

A. Yes, sir.

Q. 66. How long was it after the failure of the German-American Bank?

A. It was a month, or less than a month. It was less than a month, because the failure of the bank was on the 30th of October, and it was during November that I began collecting my rents.

Q. 67. You have been collecting them ever since?

A. Yes, sir; at least my agent has.

Q. 68. Your agent is Mr. John Sherman?

A. Yes, sir.

Q. What has become of the property called the New York Restaurant, on Pennsylvania avenue, at the corner of Jackson Hall alley?

A. It is in possession of Mr. Keyser, the receiver of the bank.

Q. Did you convey it away?

A. Yes.

Q. Do you know when?

72 A. I do not know that I can name the exact time; it was near the close of 1878.

Q. State the circumstances under which you conveyed that property, as well as you can, from the beginning.

(Question objected to as immaterial, irrelevant, and incompetent.)

A. The circumstances under which I conveyed that property were these, as near as I can recollect: A short time after the failure of the German-American Bank—I do not remember exactly how long a time, but soon after—I was requested by Mr. Hitz to execute a deed of that property—the property called the New York House. Upon asking why I should execute any such deed, I was told that that house had already been conveyed to Mrs. Hatch.

Q. By whom?

A. By Mr. Hitz. And upon my saying that I knew nothing about it, and asking how it could be put away, I was told that it had been conveyed to her during my absence in Europe, and that a separate deed had been sent to me for signing and acknowledging there, and had been signed and acknowledged by me. I was totally ignorant that any such thing had ever been done, and I asked to see the deed—the deed that I had signed. No such deed could be produced, and no such deed ever was produced. The deed signed by Mr. Hitz was produced conveying the property to Mrs. Hatch, but it was not signed by me, and no deed signed by me ever was found. This deed signed by Mr. Hitz alone was in Mr. Keyser's possession. It came into his possession with other papers of the bank; and Mr. Keyser wished to have a deed from me, or wished to have the deed which he had perfected, or a new deed made, so that he could take possession of the property. I was reluctant to make any such deed. I saw no reason why I should. I had no reason to sell the property, and I never had any intention to sell it. But it appeared that $15,000 had been borrowed upon the property by Mr. Hitz and received by him from the bank—the German-American Bank; and finally I found myself placed in such a position that, by the advice of my counsel, Mr. Cox, I made the deed.

Q. Was there anything said about Mr. Hitz conveying your estate, or his interest in your estate, to a trustee for your benefit at that time?

73 (Objected to as incompetent, irrelevant, immaterial, and leading.)

A. I wished to have that done. I wished to have my property actually within my own control. I was not satisfied with the way in which it had been managed, for a very good reason, I think. I made that a condition of my making this deed to Mr. Keyser to this piece of property, which I never had conveyed away before.

Q. Was there any conclusion arrived at, or any agreement made?

A. Yes, sir; both the deeds were made. The deed which I wished made was made to me, and I made the deed of the New York House to Mr. Keyser.

Q. The deed which was made to you is one of the controversies in this case. There is a copy of it here which I have in my hand belonging to the plaintiff's testimony and marked "N. M. B. Exhibit No 2." It is a deed from John Hitz and Jane C. Hitz, his wife, to William G. Metzerott and Samuel Cross. Is that the deed you refer to?

A. Yes, sir.

Q. It bears date the 9th day of December, 1878. Now, will you state upon what other considerations in addition to this New York House this conveyance was made to you, as you understood it?

(Objected to as immaterial and incompetent.)

A. Well, I don't know what other consideration there was.

Q. There was no other consideration than the exchange of the New York House—your deed of that?

A. That was all.

Q. It has been asserted by Mr. Metzerott in this case, not only in his answer but in his testimony, that this deed was to be held by him in escrow, and not to be put upon record or used until the debts of John Hitz to the German-American National Bank should be paid and settled. I want to know if there was any bargain made by you of that character; and if there was any such contract understood, state what it was.

(Objected to as incompetent, immaterial, and leading.)

A. There was no bargain or contract of that character; only the deed was made to this property to trustees for me. I expected it to be completed and I wanted to have it immediately. That
74 is what I wished. That was my object in having it made, but my counsel, Mr. Cox, thought it best not to have it recorded at that time. I did not view that suggestion favorably. In fact, I was quite opposed to it, so much so that I was disposed not to complete the other deed, but in deference to the opinion of my counsel I allowed it to be so. There was no length of time set for which the deed was not to be recorded; no time fixed when it should be recorded, but it was simply left so temporarily.

Q. Was there any excitement in the community at that time by the failure of the German-American National Bank?

(Objected to as immaterial, incompetent, and leading.)

A. Yes, sir. I think there was.

Q. How did Mr. Metzerott come to be put in this deed as a trustee?

A. Mr. Cox suggested that it was necessary to have a trustee, and I suggested Mr. Metzerott's name simply because he was a gentleman whom I had known for many years and appeared to be a most suitable person.

Q. Did you have any interview with him before the deed was made?

A. I did.

Q. Where?

A. I think at his store. I think I called upon him at his store, stated the circumstances, and asked if he was willing to act as trustee, and he said he was.

Q. Was there anything said between him and you at that time about keeping this deed off the records?

A. I think not, because I do not think Mr. Cox had made the suggestion at that time.

Q. Did he give his consent at that interview to act as trustee?

A. Yes, sir.

Q. Where and when did this conversation take place about withholding the deed from the record?

A. At Mr. Cox's office.
Q. Who was present?
A. Mr. Cox and myself. I think Mr. Hitz; I am not positive.
Q. Mr. Metzerott was not there?
A. No.

75 Q. Do you know whether Mr. Cox suggested to Mr. Metzerott or told him of the proposition not to put the deed upon record? What do you know of that personally?

A. I think Mr. Metzerott was told of that either by Mr. Cox or myself.
Q. Then it was not the intention to put the deed upon record immediately?
A. I think so.
Q. What was your idea about the reason that it was not to be put on record?
A. I think the reason given by Mr. Cox was that there was some excitement in the community in regard to the failure of the German-American bank, and he thought it best not to put it on record. He did not say why particularly.
Q. Who was present when the deed was signed and acknowledged? I mean this deed to Metzerott and Cross.
A. Mr. Cox, Mr. Hitz, and myself.
Q. Was Mr. Metzerott there?
A. No, sir.
Q. What was done with the deed after its execution?
A. After its execution the deed was either delivered to me or to Mr. Metzerott.
Q. By whom?
A. By Mr. Cox; I think it was given to me and I placed it in his hands.
Q. Did you carry it to his store on the avenue?
A. I can't be positive about that because I am not sure whether I gave the deed to Mr. Metzerott or whether Mr. Metzerott received it from Mr. Cox.
Q. Where was it executed
A. In Mr. Cox's office.
Q. In the office of Mr. Walter S. Cox?
A. Yes, sir. I know it was signed there, and I think acknowledged there.
Q. Where was Judge Cox's office then?
A. It was on Louisiana avenue, next door to the Police Court.
Q. On D street, you mean?
A. Is that D street?
Q. Yes; that would be between Fifth and Sixth streets, would it not?
A. Yes, sir.

Q. Are you sure Mr. Metzerott was not present?
76 A. Yes, sir.

Q. Did you and Mr. Hitz sign at the same time?

A. I think so.

Q. Did you acknowledge it together?

A. I think so.

Q. Did Mr. Metzerott take possession of the deed immediately after its execution?

(Question objected to as immaterial.)

A. I am not positive about that.

Q. You don't remember what became of it?

A. No; I do not remember whether I took it that day at Mr. Cox's office or not. I remember that it was to be put in Mr. Metzerott's hands.

Q. Did Mr. Hitz say anything about this deed not being put on record?

A. I think not.

Q. There was no bargain, was there, as you know of, with him, that it should not be put on record?

A. None at all. The suggestion came from Mr. Cox, not from me.

Q. He was your attorney?

A. Yes, sir; he was my attorney.

Q. Now, when did you get the deed again, and how? Let me ask you another question first: How long had you known Mr. Metzerott?

A. Twenty or twenty-five years.

Q. Had he been connected with you in business in any way, and what had been your relations with him?

A. He had been my tenant for a number of years. At one time he attended to my business affairs during Mr. Hitz's absence in Europe.

Q. Who was your adviser about matters and things generally during past years?

A. Up to the last two years I had no adviser.

Q. Did Mr. Metzerrott have anything to do with your business, before the failure of the bank, as adviser?

A. He only had to do with it as agent during Mr. Hitz's absence. He collected rents and made repairs and acted as my agent.

Q. Did he ever have the custody of any of your particular property for you?

A. No; not for me.

77 Q. Now please state how and when you again got into possession of this deed to Mr. Metzerott?

A. As near as I can recollect it, I received the deed from him about a week or ten days after its execution. I am not positive about the time, but I think it was about that time. It was not long. It was only in his hands while I was having a receptacle prepared for it.

Q. What was that receptacle?

A. I was having a box made to place my papers in and deposit in the bank, because I did not think it very safe to have them in the house. I think it was at Mr. Metzerott's suggestion that I had the box made, such as papers are generally kept in in a bank, with my name on it and a lock and key; and it was while that was being made that Mr. Metzerott had this deed in his possession, and when the box was made I went to his store. He had the box made for me and he gave me the deed, and I put it in the box, locked it, and took the key, and he took it to the bank and deposited it there for me.

Q. Have you had control of that box ever since?

A. Yes, I have; with my papers in it.

Q. Was there anythixg said about recording the deed, when Mr. Metzerott delivered the deed?

A. I do not think anything was said, as far as I can recollect.

Q. How did it happen that this deed was put on record?

A. Well, in talking with you about my affairs, some time after, I mentioned to you that there was such a paper, and you advised me to have it recorded.

Q. What did you do with the deed then?

A. I went and got it and had it put on record.

Q. Does the deed include all the property now remaining of your father's estate, so for as you know?

A. It includes all of which I have possession.

Q. Then if there is any other property belonging to your father's estate, you haven't got possession of it?

A. No.

Q. You don't know where it is?

A. Oh, yes; there is real estate I know of, some of which is in litigation and in Mr. Keyser's possession. Some of the property I have named is in his possession.

Q. To what do you refer?

A. Property corner of Ninth and G streets.

78 Q. What was the value of that property in 1876?

A. I do not know that I can say.

Q. What is it worth now?

A. I value it now at $30,000.

Q. Mr. Keyser is in possession and collecting the rents?

A. Yes, sir.

Q. How came you to convey that property?

(Objected to as immaterial and irrelevant.)

A. I never conveyed it away; that is, I never knowingly conveyed it away.

Q. Did you ever get any money, in consequence of that property, by virtue of any conveyance that was made of it?

A. No.

Q. It seems there was $20,000 borrowed on it by somebody. Did you ever get any part of that?

A. No.

Mr. Totten: The matter was in litigation in equity cause in this court entitled "Keyser *v.* Hitz *et al.*, No. 6,583."

Q. There is amongst the papers in this case, Mrs. Hitz, a deed of trust running to Mr. Keyser which appears to have been executed by you. I refer to the deed marked "N. M. B. Y." What consideration did you have for the execution of that deed? I mean the deed bearing date November 2, 1878—John Hitz and others to Benjamin U. Keyser, receiver.

A. Well, that refers to property on Capitol Hill, does it not?

Q. Yes.

A. I do not think I had any consideration.

(Objected to as preposterously irrelevant and immaterial.)

Cross-examination by Mr. Nathaniel Wilson, for complainant:

Cross-Q. 1 What personal property have you, Mrs. Hitz, from which you derive your income?

A. I have some stock in the National Metropolitan Bank; that is all.

Cross-Q. 2. How much?

A. I think about $13,000.

Cross-Q. 3. Is that the only source of revenue or income that you have?

A. No, sir; I have the rents of property.

Cross-Q. 4. I mean besides the rents of property?

79 A. I have no income besides that.

Cross-Q. 5. What rents do you receive from property described in this proceeding?

A. The building known as Metzerott Hall brings about $6,000. The house at the corner of Eighteenth and E streets brings $25 per month. The two houses on Eighth street bring 22.50 per month each.

Cross-Q. 6. You have no other income?

A. No, sir.

Cross-Q. 7. From any source?

A. No.

Cross-Q. 8. Mr. Hitz was intrusted by you with the management of all your property, real and personal, was he not?

A. Yes, sir; he managed for me.

Cross-Q. 9. You have no knowledge of the exact income derived from your estate, or of the expenditures made by your husband in respect of the support of his family—of his general mode of living?

A. Oh, yes; I know all about our general mode of living.

Cross-Q. 10. At that time?

A. At all times; I know very nearly what it costs us to live, because those expenditures are made by me. I could not, perhaps, give a perfectly correct idea of it, but I can give an appropriate idea of it; also, what my income was.

Cross-Q. 11. And the expenses incident to the support of the family were within your knowledge and control?

A. Yes, sir.

Cross-Q. 12. From whom did you receive moneys that you expended?

A. It was my own money.

Cross-Q. 13. Mr. Hitz, then, did not have control of your own money?

A. Yes, sir; I received it through his hands. When I wanted money I told him how much, and he went to the bank and brought it to me.

Cross-Q. 14. In whose name was the bank account kept?

A. In his name.

Cross-Q. 15. Did you keep an account of the moneys received by you from him?

80 A. I kept an account of my expenditures; I have no other account than that; I have always been in the habit of keeping an account of my expenditures.

Cross-Q. 16. You had no knowledge of the sources from which your money was obtained other than it was handed you by Mr. Hitz at your request.

A. Yes, sir; I know pretty well where it was obtained.

Cross-Q. 17. Did you know at that time?

A. I didn't know at the time so well as I know now.

Cross-Q. 18. Had you any idea at the time?

A. Yes, sir; I had a pretty strong idea where it was obtained.

Cross-Q. 19. How was it obtained?

A. It was obtained from the income of my property; it *was* the income of my property.

Cross-Q. 20. You mean to say he didn't consult you in regard to the disposition of any of your property and the management of your business affairs?

A. There was not much consultation about it between us.

Cross-Q. 21. Were you in Washington when the German-American Bank failed?

A. Yes, sir; I was.

Cross-Q. 22. Did you know at that time of this indebtedness to the National Metropolitan Bank on the note that is described in the proceedings in this cause?

A. I did not.

Cross-Q. 23. When did you first hear of it?

A. I didn't hear of it until after the failure; I do not remember when I first heard of it; I cannot fix the time, but never until after the bank failed; I didn't know he had any indebtedness.

Cross-Q. 24. When did you hear his name was on this note, as near as you can state? Was it soon after the failure?

A. That I cannot recollect; I am not positive that I ever heard of it until after suit was brought. I *am* positive of that.

Cross-Q. 25. How long had Mr. Cox been your counsel when this deed was executed?

A. He was my counsel from November, 1878, up to the time he became a judge and had to give up my case, which, I think, was March, 1878.

Col. Totten: It was in April.

Witness: Oh, yes; April, 1879.

81 Cross-Q. 26. Mr. Wilson: He had been your counsel since when?

A. From November, 1878, after the failure of the bank. He had not been my counsel before; I had never had any occasion to employ counsel before.

Cross-Q. 27. Was Mr. Cox employed by you at Metzerott's suggestion?

A. Oh, no, sir; at no one's suggestion. I employed him because I had known him a number of years before, slightly, personally. It was my own choice.

Cross-Q. 28. Do you remember going to Metzerott's store a short time after the failure of the bank, and conferring with him about getting a deed from Mr. Hitz?

A. The deed referred to?

Cross-Q. 29. The deed referred to from Mr. Hitz of his interest in your property.

A. I do not recollect ever conferring with Mr. Metzerott about any deed. I remember only one conversation with him.

Cross-Q. 30. Where was that?

A. At his store.

Cross-Q. 31. Do yon not remember that you had seen Mr. Cox before you saw Mr. Metzerott, and that you stated to Mr. Metzerott that Mr. Cox advised that the deed should be executed?

A. I am not positive of that; I may have stated it, but do not remember it.

Cross-Q. 32. Do you remember going with Mr. Metzerott to Mr. Cox's house?

A. I never went with Mr. Metzerott to Mr. Cox's house. I have never been to Mr. Cox's house in my life, but I have been with Mr. Metzerott once or twice to Mr. Cox's office.

Cross-Q. 33. You never went to his house?

A. I never was at his house in my life.

Cross-Q. 34. Did you go to his office several times before the deed was executed?

A. I had been there perhaps twice before the deed was executed, with Mr. Metzerott. I do not remember whether it was in reference to this deed particularly; it was in reference to business matters generally; I do not know whether it referred to that deed or not.

82 Cross-Q. 35. If Mr. Metzerott states that it was distinctly understood between you and him that that deed or paper was not to go on record until all matters connected with the bank

had been settled, and all present claims against Mr. Hitz had been settled, would he be correct or incorrect?

A. It was so understood by him; I understood no such arrangement, and would not have entered into such an arrangement.

Cross-Q. 36. Have you any objection to Mr. Cox's stating, as your counsel, and do you waive all objection to his stating what occurred between you and him and Mr. Metzerott in relation to that deed, and the purposes for which it was executed?

A. I should prefer to consult Col. Totten before answering that question.

Cross-Q. 37. Did you ask Mr. Metzeroot if he would consent to act as trustee?

A. I think I did.

Cross-Q. 38. Did he give his answer with any condition?

A. I do not remember his making any condition.

Cross-Q. 39. Is it your best recollection that he did not make any condition as to putting that deed on record?

A. To the best of my recollection he did not make any condition whatever.

Cross-Q. 40. Are you quite sure of that?

A. I think he did not make any condition.

Cross-Q. 41. When he ascertained that the deed had been put on record, did he make any objection or complaint.

A. He made a complaint.

Cross-Q. 42. What did he say?

A. He said that an agreement had been entered into between us that the deed should not be recorded until the debts of Mr. Hitz to the bank had been paid. That is now my understanding.

Cross-Q. 43. Have you any doubt of its being *his* understanding?

A. I did not understand that it was his understanding, but it appears afterwards to have been.

Cross-Q. 44. Do you remember its being said in his presence (and of course in your hearing) that the deed would produce a very bad effect—create a very bad impression—if placed on record?

A. I do not think I ever heard that said by anybody. Mr.
83 Metzerott said something of that kind after the recording of the deed. I do not think I heard it said before.

Cross-Q. 45. Do you remember hearing him say it was an excellent thing?

A. No, sir.

Cross-Q. 46. When was the other deed of trust executed to which you have reference?

A. The deed of trust to Mr. Keyser?

Cross-Q. 47. Yes.

A. I think it was before the execution of this. I think it was in November, 1878, if I am not mistaken—November or December. I cannot speak positively about that.

Cross-Q. 48. When you executed the deed, did I understand you to say Mr. Metzerott was present?

A. I did not say he was; I am positive he was *not*.

Cross-Q. 49. You gave the deed into his hand?

A. The deed was placed in his hand. I am not positive whether I gave it to him, or whether it was sent to him from Mr. Cox's office, or whether he sent there for it. My impression is that I placed it in his hands.

Cross-Q. 50. And requested him, after the deed had been placed in his hands, to obtain a box for your papers?

A. No, sir; I think that was a suggestion of his to me. I think he said I should have such a box, and I then requested him to obtain one for me.

Cross-Q. 51. State again, as particularly as you can, the reasons why the deed was not immediately placed on record after its execution?

A. I know no other reason than the suggestion from Mr. Cox that it would be more advisable not to put it on record. Reason given was that there was some excitement in the community about the failure of the bank; but he didn't lay much stress upon it.

Cross-Q. 52. Did you object?

A. Yes, sir.

Cross-Q. 53. Did you state your objection to him?

A. Yes, sir; to him.

Cross-Q. 54. Did you state your objection to Mr. Metzerott?

A. He was not present.

Cross-Q. 55. Was anything said as to the time when the deed should be put on record?

A. Nothing at all.

84 Cross-Q. 56. And you took the deed then and gave it to Mr. Metzerott, understanding that it was not to be put on record immediately?

A. I am not positive that I gave it to Mr. Metzerott at all. But my understanding was that it was not to be put on record.

Cross-Q. 57. Was it not the understanding of Mr. Metzerott that it was not to be put on record?

A. It may have been so.

Cross-Q. 58. Was it not his understanding?

A. I cannot say positively.

Cross-Q. 59. To the best of your information and belief, was it not his understanding that it should not be put on record?

A. I think that since the recording of the deed, from what he has said to me, that it was. My impression about this matter has always been that Mr. Metzerott's part in that deed was a matter of no importance; that the trusteeship was a matter of no importance to the trustee; I thought it a mere matter of form, of no importance to Mr. Metzerott, and could cause him no inconvenience in any way, and consequently I never laid any stress upon it. I was

told by Mr. Cox that it made no difference to the trustee, and I simply named Mr. Metzerott; he was an old friend and acquaintance.

Cross-Q. 60. When you got that deed, and when he received it, was it not the understanding with him that it should not be put on record immediately?

A. I am not able to state positively about that, because I do not recollect that I gave it to him; I am not positive at all how he obtained it; I do not recollect that I gave it to him.

Cross-Q. 61. Did he give it back to you?

A. Yes, sir.

Cross-Q. 62. Into your hands?

A. Into my hands.

Cross-Q. 63. And did you place it in the box?

A. I think I put it in the box and locked the box.

Cross-Q. 64. Then if he states otherwise he is mistaken?

A. I think he is mistaken.

Cross-Q. 65. Were there not a number of other papers in the box?

85 A. No, sir; there were very few, if any, in the box at the time; there were a number in afterwards.

Cross-Q. 66. Did you not take all the papers to Mr. Metzerott?

A. No, sir; he may have had papers of mine, but most of them were at my dwelling-house.

Cross-Q. 67. If he says that he bought the box, and that you brought the papers, and that he put them in the box, he is mistaken?

A. No; it is possible that he may have put it in the box and handed it to me. I had other papers to go in the box, and that may have been the case.

Cross-Q. 68. Were you not in the habit of consulting him at that time about all your business?

A. No, sir; not all my business; I consulted with him more than any one else.

Cross-Q. 69. Was he not acting in a friendly way and aiding you by his advice?

A. I think so; I think he has always done that; I had very high esteem for him and for his opinion, and I consulted him more than I did any one else.

Cross-Q 70. Why was it placed in that box?

A. For safe-keeping; I did not like to have valuable papers in my house because I was afraid of fire; my house was a frame and old; and more so because Mr. Metzerott told me it was not safe to keep the papers in my house, and that the bank was the proper place to keep such things. I think he directed my attention to the unsafeness of having them in the house.

Cross-Q. 71. And then, if it had not been for his suggestion, the deed would have remained in his possession?

A. No, sir; the deed would have remained in my possession.

Cross-Q. 72. Was it in his possession before you bought the box?

A. Yes, sir.

Cross-Q. 73. Did you in any way confer with him?

A. No.

Cross-Q. 74. Did he know it was your purpose to put it on record?

A. No; not supposing it was of any importance, I didn't inform him of it; I had not the slightest objection to his knowing it.

86 Cross-Q. 75. Is it true, then, that he never gave any consent to its being put on record?

A. So far as I know, he never did.

Cross-Q. 76. Is it not true that Mr. Cross objected to its being put on record?

A. I never saw Mr. Cross about the matter at all until after the recording of the deed.

Cross-Q. 77. What occurred then?

A. He came to my house and said that Mr. Metzerott was disturbed, and was dissatisfied about the recording of the deed; that Mr. Metzerott said that such was not the understanding with us. I said I was very sorry for it, and I must have understood differently.

Col. Totten: Sorry for what?

Witness: Sorry that Mr. Metzerott was disturbed about it.

Cross-Q. 78. (By Mr. Wilson:) State what you said to Mr. Cross more than that, if anything, about the filing of the deed?

A. I think there was nothing more said than that; our interview was not a long one, I think, and we talked about other things, as well as I remember; I do not remember so very distinctly; so much time has elapsed that I do not remember these things so easily as when they were going on.

Cross-Q. 79. Did Mr. Cross inform you at that time that he thought it was distinctly understood that the paper was not to be put on record until Mr. Hitz cleared up his indebtedness to the bank?

A. He informed me that that was Mr. Metzerott's understanding; I do not know that he spoke of its being his own understanding; I suppose that his understanding was the same. He stated that the objection to the recording of the deed was Mr. Metzerott's; he, himself, seemed to be rather indifferent; he didn't seem to care about it; I do not think he spoke with his own feeling.

Cross-Q. 80. Did you obtain Mr. Cross' consent to act as trustee in any way, or do you know of his having been asked to act as trustee?

A. He was asked, and his consent obtained, by Mr. Metzerott; I did not see him in person; he was suggested by Mr. Metzerott as the other trustee.

87 Cross-Q. 81. Then the consent he gave was given to Mr. Metzerott and not to you?

A. Yes, sir; to Mr. Metzerott, and not to any one else, so far as I know.

Cross-Q. 82. Had you any acquaintance with Mr. Cross?

A. I had a slight acquaintance with him.

Cross-Q. 83. Mr. Cross was not present at the time the deed was executed?

A. Oh, no.

Cross-Q. 84. You don't know of its having been seen by him before it was put on record?

A. I do not know that he ever saw it. If he did, Mr. Metzerott showed it to him. He was not present at any time that I conversed with any one about it.

Cross-Q. 85. When Mr. Metzerott was informed of the filing of the deed for record, did he intimate to you his purpose to put in a protest?

A. Yes, I think he told me that; that Mr. Cross came to see him, and I stopped to see Mr. Metzerott and spoke to him about the matter, and he then repeated to me his dissatisfaction of the recording of the deed, and I think he mentioned his intention of filing that paper. I am not quite positive, but I think he did.

Cross-Q. 86. Do you remember asking Mr. Metzerott several times about the purchase of that box before it was actually purchased?

A. No, sir; I do not remember that I ever asked him about it at all. It is possible I may have asked him after it was decided that I should have it made. I do not remember distinctly.

Cross-Q. 87. When and where did you first see Mr. Metzerott after the deed was placed on record?

A. At his store, and a day or two after; at least a day or two after Mr. Cross' visit to me.

Cross-Q. 88. Did you or did you not state to Mr. Metzerott at that time that you had done wrong in not informing him of your intention to put the deed on record?

A. No, sir; I did not.

Cross-Q. 89. You did not?

A. No, sir; I did not. I made a remark which might have been construed into that. I said I was sorry he felt dissatisfied and discontented. I never stated and I never meant that I was sorry it had been recorded. I wanted it so.

88 Cross-Q. 90. I am not asking anything about the recording, but whether you didn't say you were wrong in not telling him what you were going to do?

A. I did not.

Cross-Q. 91. Did you state to him that you didn't think there was anything important in the recording of the deed?

A. I never said that it was of no importance, because it was of

great importance to me. I do not remember that I said that, but that was what I thought, and I *may* have said it.

Cross-Q. 92. Did you state to Mr. Metzerott that you didn't think you were doing anything wrong in giving the paper to Mr. Totten?

A. I may have said so; I do not remember it.

Cross-Q. 93. If Mr. Metzerott states that you gave the deed to him yourself, is he mistaken or correct?

A. I am not sure.

Cross-Q. 94. What is your best recollection?

A. I really do not remember whether I did or not.

Cross-Q. 95. If he states it to be so, would you believe it or not?

A. I should believe that he thought so.

Cross-Q. 96. Would you believe the fact?

A. I cannot say; he might be mistaken.

Cross-Q. 97. (By Mr. Wilson:) Please answer at the next session whether you are willing and waive all objections to Mr. Cox, your former counsel, stating what occurred at the interview when Mr. Metzerott was present and acknowledged the execution of the deed.

JANE C. HITZ.

Subscribed and sworn to before me this 23rd day of July, A. D. 1880.

[SEAL.] BERTRAM ZEVELY,
U. S. Commissioner and Examiner in Chancery, D. C.

Mr. Totten offers in evidence the following papers: (1) Copy of the pleadings and proceedings in the case of the National Metropolitan Bank of Washington against John Hitz, Mattingly, Donaldson, and others, being law cause No. 29,351; (2) inventory of the goods and chattels and personal estate of Michael Shanks, deceased, made by John F. Callan and W. E. Howard, bear-
89 ing date June 9th, 1864; (3) first and final account of James Adams, administrator of Michael Shanks, deceased, which was passed by the orphans' court, June 27th, 1867.

These are marked by the examiner for identification "J. C. H., Exhibits 1, 2, and 3," respectively.

The introduction of these in evidence is objected to by Mr. Wilson as incompetent and irrelevant.

Adjourned to Friday, July 16th, 1880, 12 o'clock M.

FRIDAY, *July* 16, 1880.

At the request of Colonel Totten the examination was postponed to Tuesday, July 20, 12 M.

TUESDAY, *July* 20, 12 M.

No examination. Examiner sick.

WASHINGTON, D. C., *July* 21, 1880.

Met at the office of Nathaniel Wilson.

Present: Mr. Wilson, solicitor for complainant; Mr. Totten, solicitor for Mrs. Jane C. Hitz; and Benjamin U. Keyser, Esq., witness

Mr. Keyser, having been first duly sworn, deposes and says:

My name is B. U. Keyser; I reside in the District of Columbia; am not related to the parties to this suit, and have no interest therein.

Q. By Mr. Totten: Where do you live, and what is your business?

A. I live in Washington city, my business for the present is receiver of the German-American National Bank.

Q. 2. Have you examined the books and accounts of the German-American National Bank as to the assets, &c., thereof?

A. I have.

Q. 3. I want you to give a general statement of the amount claimed by you for that bank against John Hitz.

(Objected to as immaterial and not the best evidence.)

A. I can give you from memory a rough statement of the amount I claim against John Hitz, about $90,000, exclusive of two Chiply notes of $10,000 each.

Q. 4. Have you caused any suits at law to be instituted
90 against Mr. Hitz to recover this indebtedness, or any part of it?

(Objected to.)

A. I have.

Q. 5. How many?

A. Three or four.

Q. 6. When did you institute the first one?

A. I think in the fall of 1879.

Q. 7. Do you remember the month? Was it not the 11th November, 1879?

A. I think it was about that time.

Cross-examination by Mr. Wilson:

Cross-Q. 1. As receiver of the German-American National Bank, did you buy in the property covered by deed of trust from John Hitz and Jane C. Hitz to Mattingly and Prentiss, on Pennsylvania avenue, corner of Jackson Hall alley?

A. I did, in February, 1879.

Cross-Q. 2. For how much?

A. I bought it in for $10,000. The amount of the debt was $15,000—$17,000, I guess, would be nearer.

Cross-Q. 3. Did you dispose of it?

A. I have it yet.

Cross-Q. 4. What is the value of it?

A. I suppose between $7,500 and $9,000.

Cross-Q. 5. Do you know anything about the value of the piece of property on the corner of G and Ninth streets?

A. I suppose it was worth about $30,000.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 22d day of June, A. D. 1880.

BERTRAM ZEVELY,
Examiner in Chancery and United States Commissioner, District of Columbia.

91 *Docket Entries in Law Case.*

J. C. H. Exhibit No. 1.

Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK OF WASHINGTON
vs.
JOHN HITZ, WILLIAM F. MATTINGLY, ROBERT B. Donaldson, and Charles E. Prentiss. } No. 20,351.

Action: Note $10,000.

Plaintiff's attorney: Nathaniel Wilson.

Defendant's attorneys: Mattingly, P. P.; F. Miller, for Donaldson; R. D. Mussey, for Prentiss.

Costs: Attorney, $5; marshal, $4; clerk, $15.75; defendants' bill for printing record, $12.65; clerk, $3.70.

Date.	Proceedings.	Clerk's fees.
1879.		
Jan. 15.	Deposit toward costs, $10 by Wilson, order, &c., decl., notice, affi., copy, note, and pro., filed...	$1 65
15.	Summons (5) and 4 copies of decl., notice, affi. issued	6 00
15.	Summons and copies of decl., notice, affi., served all.....	25
Feb'y 4.	Time for defendants to plead extended to February 18, 1879, order of Chief-Justice Carter filed	25
April 19.	Appearance of Mattingly, 4 pleas and affidavit filed, jurat.....	75
19.	Appearance of Miller for deft. Donaldson, 4 pleas and affi. filed.....	90
22.	Appearance of Mussey for deft. Prentiss, 4 pleas and affi. filed.....	65
23.	Motion for Judgt. *vs.* defts. Donaldson, Prentiss, and Mattingly filed.....	25

	28.	Note and protest filed, and judg. by default *vs.* John Hitz for $10,000 and interest @ 7 per cent. from Oct. 14, 1878, till paid, and $1.85 cost of protest and costs. (M. 14, p. 483.)	3 40
June	5.	Fi. fa. issued *vs.* Hitz. Returned *nulla bona*.....	1 65
	5.	Short copy.....	50
July	2.	Judgment on motion against defts. Mattingly, Donaldson, and Prentiss for $10,000 and interest @ 7 per cent. from Oct. 14, 1878, till paid, and $1.85 costs of protest and costs, and appeal prayed. (M. 15, p. 41.).....	90
Dec.	9.	Decree General Term, reversing and remanding cause as to defts. Mattingly, Donaldson, and Prentiss. (3d M. G. T., p. 470.).....	
	22.	Motion for rehearing. (M. 3 G. T., p. 480).....	60
92	23.	Joinder of issue on pleas of defts. Mattingly, Donaldson, and Prentiss, notice of trial and note of issue filed, calendared.....	1 15

The above is a true copy of the docket entries in above-entitled cause.

R. J. MEIGS, *Clerk.*
By J. R. MEIGS,
Assistant Clerk.

DISTRICT OF COLUMBIA, } *to wit:*
WASHINGTON COUNTY, }

The United States of America to John F. Callan and William E. Howard, greeting:

This is to authorize you jointly to appraise the goods, chattels, and personal estate of Michael Shanks, late of Washington county aforesaid, deceased, so far as they shall come to your sight and knowledge, each of you having first taken the prescribed form of oath (or affirmation), a certificate whereof you are to return annexed to an inventory of the said goods, chattels, and personal estate by you appraised in dollars and cents, and in the said inventory you are to set down in a column or columns opposite to each article the value thereof.

Witness: William F. Purcell, Esq., sole judge of the Orphans Court of Washington county, D. C., this 31st day of May, 1864.

{ Seal of Orphans Court Washington County, D. C. }

Test: Z. C. ROBBINS,
Register of Wills.

DISTRICT OF COLUMBIA, } *ss:*
WASHINGTON COUNTY, }

OFFICE OF REGISTER OF WILLS.

Personally came before me, register of wills in and for the said county, John F. Callan and William E. Howard, who, upon their

solem oath, did say that they will well and truly, without partiality or prejudice, value and appraise the goods, chattels, and personal estate of Michael Shanks, late of Washington county aforesaid, deceased, so far as they shall come to their sight and knowledge, and will in all respects perform their duty as appraisers to the best of their skill and judgment.

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J. F. CALLAN.
W. E. HOWARD.

Sworn and subscribed this 1st day of June, 1864, before me. { U. S. Revenue Stamp. 5 cents. }

Z. C. ROBBINS,
Register of Wills.

Inventory of the goods, chattels, and personal estate of Michael Shanks, late of Washington county aforesaid, deceased, taken and made by us, the subscribers, in conformity with the above deposition:

2 hair-cloth settees, at $8 each	$16 00
1 melodeon	10 00
1 marble-top stand	5 00
2 mahogany card-tables	10 00
1 large mahogany book-case and secretary	25 00
1 plain iron-case clock	5 00
80 volumes miscellaneous books	20 00
1 small round table	50
Glass shade and vases	2 00
30 yards Brussels carpet, at $1.50	45 00
2 hair-cloth mahogany sofas	40 00
1 old mahogany piano and stool	70 00
1 mahogany center table	10 00
1 stained fancy oval table	10 00
1 walnut whatnot	5 00
1 round French-plate mirror	6 00
1 brass French mantle clock	30 00
4 girandales, at $2.50	10 00
1 scarlet table-cover	75
1 plaster pitcher and bust	3 00
3 pictures and frames, at $5	15 00
2 china spittoons, at 50 cents	1 00
1 fancy sideboard, iron safe	25 00
1 fancy iron-case clock	5 00
2 cane-seat chairs and two mats	2 25
30 yards carpeting, rods, &c	25 00
1 office iron safe	30 00
1 single iron bedstead	10 00
1 feather bed	7 00
1 shuck mattress	
3 trunks at $6 each	18 00

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	15 yards drugget and 12 yards carpet	5 00
	1 mahogany bureau	5 00
	1 mahogany washstand	5 00
	2 chairs	2 00
	1 large gilt-frame mirror	6 00
	1 lot miscellaneous china	10 00
	1 lot miscellaneous glass	20 00
	1 lot misellaneous crockery	10 00
	1 pine clothes-press	5 00
	1 ladies' mahogany work-table	3 00
	1 wooden-case brass clock	3 00
	1 pair candle sticks, snuffer, &c	1 00
	1 lounge	3 00
	1 mirror	3 00
	1 mahogany washstand	1 00
	1 double iron bedstead	6 00
	1 feather bed	25 00
	1 shuck mattress	4 00
	1 mahogany bureau	8 00
	1 pine wardrobe	10 00
	22½ yds. drugget at 20c	4 50
	1 Franklin stove	5 00
	2 hair-cloth foot stools	5 00
	2 easy chairs and 1 office chair	5 00
	1 mahogany writing-desk	4 00
	1 fancy brass mantle clock and ornaments	10 00
	22½ yds. drugget and matting at 40c	9 00
	1 walnut whatnot	12 00
	1 small mahogany leaf table	5 00
	1 mahogany dining table	15 00
	7 chairs, assorted	7 00
	1 mahogany secretary	10 00
	2 China vases	1 00
	1 French-plate mirror	20 00
	1 old bedstead and shuck mattress	2 00
	1 mirror	1 00
	1 feather bed	20 00
	1 double shuck mattress	1 00
	2 spring-bed frames	5 00
95	1 settee	3 00
	1 mahogany high-post bedstead	10 00
	Sundry curtain fixtures	2 50
	1 lot old furniture and mirror	5 00
	1 lot misc. books and maps	3 00
	1 lot canes	2 00
	2 old guitars	3 00
	1 tin bath tub	5 00
	1 chandelier	2 00

1	double iron bedstead	6 00
2	chairs	2 00
	Bed clothes for one bed	15 00
1	mirror	5 00
1	set chamber ware	2 00
1	oval mahogany table	3 00
1	pine pier table and cover	1 00
1	old liquor chest	3 00
2	blinds	2 00
1	fender	2 00
	Miscellaneous lot of books	1 00
2	carpet bags	3 00
1	leather valise	5 00
1	small round table	75
3	old guns	2 00
2	double-barrelled scatteration pistols	12 00
1	Allen's revolver in case	10 00
1	Hall's carbine	5 00
1	microscope	7 00
1	telescope	5 00
½	cord pine wood	4 00
½	ton anthracite coal	4 00
	Old refrigerator, &c	5 00
3	tubs	1 00
4	stone jars	1 00
4	buckets at 25 c	1 00
1	settee and cover	2 50
1	cooking stove and belongings	5 00
1	old sideboard and table	10 00
16	yards carpeting	4 00
1	mahogany sideboard	20 00
1	walnut extension table	12 00
1	old hair-cloth sofa	10 00
	1 round 8-day hall clock	5 00
96	4 cane-seat chairs at $1	4 00
	Misc. lot of crockery and glassware	5 00
1	new refrigerator	12 00
2	hall stoves	10 00
1	tea set (3 pieces), 45½ oz., at $2	91 00
1	tea set (5 pieces), 92 oz., at $2	184 00
6	silver spoons and 1 ladle, 14 oz., at $2	28 00
2	gold watches, at $75	150 00
2	silver watches, at $5	10 00
1	watch seal	6 00
1	gold snuff box	100 00
2	chairs	15 00
36	U. S. 5-20 certificates of stock, $36,000, at 105½	37,980 00

$10,500	Virginia State stocks, at 58 c.....	6,090 00
5,000	North Carolina stocks, at 58 c.....	2,900 00
2,000	Missouri State bonds, Pacific R. R., at 70...	1,400 00
5,000	Missouri State bonds, Hannibal and St. Jo's R. R., at 93.....	4,650 00
10,000	Tenn. State bonds, at 60.....	6,000 00
2,000	W. & G. T. P. R. R. Co., 1st mortgage, at $1.00	2,000 00
11,500	W. corporation stock, 6 per cent., qtrly., at $1.....	11,500 00
200	W. corporation stock, 5 per cent., qtrly, at 83.....	166 00
1,300	W. corporation stock, 6½ per cent., qtrly, at 98.....	1,274 00
1,042	shares Bank of Metropolis ($25 pr. sh.), $26,050, at 65.....	16,932 50
7	shares Bank of Washington ($20 per share), $140, at 50 c.....	70 00
	Virginia bank notes, $513, at 25 c.....	128 25
	In Bank of Washington (depos.), $2,347.78.....	2,347 78
	House, $3,281.32.....	2,381 32
		$97,384 60

We, the subscribers, do hereby certify that the foregoing and annexed is a true and just inventory and valuation of the
97 goods, chattels, and personal estate of Michael Shanks, late of Washington County aforesaid, deceased, as far as the same have come to our sight and knowledge, amounting in the aggregate to $97,384.60.

Witness our hands and seals this 9th day of June, 1864.

JOHN F. CALLAN. [SEAL.]
W. E. HOWARD. [SEAL.]

DISTRICT OF COLUMBIA, WASHINGTON COUNTY. } *to wit:*

This 14th day of June, A. D. 1864, personally appeared James Adams, administrator of Michael Shanks, late of Washington county, deceased, and made oath on the Holy Evangels of Almighty God that the annexed list is a true and perfect inventory of the goods, chattels, and personal estate of said deceased that have come to his hands or possession at the time of the making thereof, and that what hath since or shall hereafter come to his hands or possession he will return in an additional inventory; that he knows of no concealment of any part of the deceased's estate by any person whatsoever, and that if he shall hereafter discover any con-

cealment, or suspect any to be, he will acquaint the court with the same.

{U. S. Revenue Stamp. 5 cents.} Test: Z. C. ROBBINS,
Register of Wills.

I certify that the aforegoing is a true copy of an inventory recorded on pages 124, 125, 126 and 127, in a bound volume entitled "Inventories and Sales, Z. C. R., No. 2," the same being one of the record books lodged in the office of the register of wills for the District of Columbia.

Witness my hand and seal of office this 12th day of July, A. D. 1880.

A. WEBSTER,
Register of Wills, D. C.

98 *J. C. H., Exhibit No. 2, with Defendant's Depositions.*

First and final account of James Adams, administrator of Michael Shanks, deceased, the requisite legal notice having been given:

This accountant charges himsef with the amount of the inventory	$97,384 60
And with the following amounts received, to wit: of—	
Grossmeyer, for rent	1,625 00
Boteler, for rent	1,950 00
Bennett, for rent	93 75
Beveridge	487 50
Peugh	312 50
Simmonds	83 26
Geary	30 00
Sardo	15 00
Dick	14 00
Dodson	30 00
Mitchell	175 00
Old coins	10 91
Int. on corporation of Washington stock.	778 00
Coupon Han. and St. Jos. R. R	420 00
Dividend Bank of Metropolis stock	2,735 25
Dividend Bank of Washington stock	8 40
J. W. Easby, interest	390 00
Interest on 5-20 U. S. bonds	2,160 00
Premium on same	1,981 67
J. W. Easby's three notes, $866.66⅔ each, secured by deed of trust, returned as cash by consent	2,600 00

And he claims credit and allowance for the following payments, to wit:

99	By paid—		
	Register of wills, per vouch. 1...		$15 85
	Harvey & Co., per vouch. 2		224 00
	Register of wills, per vouch. 3.....		4 50
	H. Grossmeyer, per vouch 4.....		23 75
	Appraisers, per vouch. 5.....		20 00
	Noah Walker & Co., per vouch 6.....		40 00
	August 2, 1864—U. S. tax on coupons, per voucher —		1 80
	Dr. J. Eliot, per vouch. 7..		26 00
	August 13—Tax on coupons, per vouch. —.....		7 50
	H. Grossmeyer, per. vouch. 8.....		8 00
	J. Cross, burial sites, per vouch. 9.....		63 00
	A. S. Gray, per vouch. 10.....		16 50
	Corporation taxes, 1864, per vouch. 11.		732 06
	Dr. F. B. Culver, per vouch. 12.....		100 00
	Register of wills, per vouch. 13.....		1 00
	Wall, Stephens & Co., per vouch. 14...		3 96
	Additional income tax, 1863, per vouch. 15		239 75
	Dr. Thos. Miller, per vouch. 16.....		23 00
	January 9, 1865—Taxes on coupons, per vouch. —.....		7 50
	February 6—Taxes on coupons, per vouch. —		3 00
	Mrs. M. E. Hill, per vouch. 17.....		455 00
	H. N. & J. W. Easby, per vouch. 18....		23 09
	Commissions at 5 per cent. on $113,-284.84		5,664 24
	Register of wills, per vouch. 19.....		8 03
	National Intelligencer, per vouch. 20...		6 50
			$7,717 83
	Balance due and accountable.....		105,567 01
		$113,284 84	$113,284 84

100 DISTRICT OF COLUMBIA, } *to wit:*
WASHINGTON COUNTY, }

ORPHAN'S COURT, *June* 27, 1865.

This day appeared James Adams, administrator as aforesaid, and made oath on the Holy Evangels of Almighty God that the aforegoing account as stated is just and true; that he has *bona-fide* paid,

or secured to be paid, the several sums for which he claims credit and allowance; and, after examination, the said account is passed by order of the court.

{U. S. Revenue Stamp. 5 cents.} Test: Z. C. ROBBINS,
Reg'r of Wills.

An account of the personal estate of Michael Shanks, deceased, by James Adams, administrator:

Amount of assets returned to Orphans Court per first and final account	$113,284 84	
Less amount paid out and allowed by the court per said acc't	7,717 83	
Leaving	$105,567 01	
Less fee of register of wills for stating this account and copy of same, under seal	5 00	
Leaving for distribution a balance of	$105,562 01	
Which balance is distributed as follows, according to law, viz:		
To Catherine N. Shanks, widow of deceased, $\frac{1}{3}$		$35,187 33$\frac{1}{3}$
To Mrs. Hitz, wife of John Hitz, and daughter of deceased, $\frac{2}{3}$	$70,474 66$\frac{2}{3}$	
Less $\frac{3}{4}$ of one per ct., U. S. legacy tax	527 80$\frac{1}{2}$	
		69,846 86
Legacy tax		527 80$\frac{1}{2}$
	$105,562 01	$105,562 01

101 DISTRICT OF COLUMBIA, WASHINGTON COUNTY, } *to wit:*

ORPHANS COURT, *June* 27, 1865.

This day appeared James Adams, administrator as aforesaid, and made oath on the Holy Evangels of Almighty God that the distributees named in the foregoing account of distribution are the only legal heirs of Michael Shanks, deceased, and as such are duly entitled to the several sums as from the said account doth now appear, to the best of his knowledge and belief in the premises; and thereupon the same is approved and passed by order of the court.

{U. S. Revenue Stamp 5 cents.} Test: C. ROBBINS,
Reg'r of Wills.

interest thereon from the 14th day of October, in the year 1878, at the rate of seven per cent. per annum until paid, and $1.85, the costs of protest, and the costs of this suit.

Affiant further says that the defendants, and each of them, had notice of the non-payment and protest of said note.

GEO. H. B. WHITE, *Cashier.*

Subscribed and sworn to before me this eleventh day of January, 1879.

[L. S.] WILLIAM G. MOORE,
Notary Public.

104 In the Supreme Court of the District of Columbia, the 21st day of April, 1879.

THE NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ *et al.* } No. 20,351. At Law.

Pleas of Charles E. Prentiss.

Charles E. Prentiss, defendant herein impleaded with John Hitz et al., for pleas to the said declaration says:

1. He is not indebted as alleged.
2. He never promised as alleged.
3. He has received no consideration for said promissory note, or on account thereof.
4. The plaintiff, at the time of the making and maturity of the said note, held security for the payment of said note, to which it has not resorted, as it should have done before suit brought.

R. D. MUSSEY,
For defendant C. E. Prentiss.

Affidavit of Defense.

Charles E. Prentiss, being duly sworn, says:

At the date of the making of said promissory note I was the cashier of the German-American National Bank, a corporation organized under the laws of the United States, in Washington city, in the District of Columbia.

The bank being desirious of obtaining money, a note for $10,000 was drawn up, signed by the other defendants hereto, which was to be made payable to my order as cashier, through some inadvertence, the word *cashier* was omitted in the body of the note and in my indorsement.

The note was negotiated with the Metropolitan National Bank, through its president and agent in that respect, Mr. John W. Thompson, upon the express understanding, by and with him, that

the negotiation was for the sole benefit of the said German-American National Bank.

At that time there were deposited with the said Metropolitan National Bank sundry valuable securities belonging to said
105 German-American National Bank, which had been used as collateral for loans theretofore made by said Metropolitan Bank to said German-American Bank, and which affiant understood were to be used in respect of this loan.

The proceeds of said notes were paid by the said Metropolitan Bank in a check or checks (or draft or drafts) on New York, payable to the affiant's order as *cashier*, and were at once by him, as such cashier, indorsed for the uses of the said German-American National Bank.

Before the maturity of said note the said German-American National Bank became insolvent, and was placed in the hands of a receiver, who, affiant has been informed, has recognized this sum of $10,000 as among the liabilities of the said bank.

C. E. PRENTISS.

Subscribed and sworn to before me, at Washington City, D. C., this 21st day of April, A. D. 1879.

[L. S.] JAS. A. TAIT,
Notary Public, D. C.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ AND OTHERS.

Separate Plea of Robert B. Donaldson.

1st. The defendant says that he never was indebted as alleged.

2d. The defendant says that he never promised as alleged.

3d. The defendant says that he never made the note in the manner and form as alleged.

4th. And for a further plea, the defendant says that the said note was made for the accommodation of the German-American National Bank, (a body corporate under the laws of the United States and having its habitat in this district,) and was by said German-American National Bank presented to the plaintiff for discount, and was discounted by it, and the proceeds went to and were used by said German-American National Bank; and that the said German-American National Bank, at the time the said note was discounted, deposited with the plaintiff as security for
106 the payment of said note, and to protect this defendant and his co-defendants from loss by the making of said note, $5,000 worth of stock of the German-American Fire Insurance Company and $6,700 of the stock of the National Metropolitan Bank, of the cash value of $12,000; that the said collaterals were amply

sufficient to pay said note, and would have paid the same, but the plaintiff wrongfully delivered them up, and deprived this defendant of the protection upon which he relied in consenting to make said note for the accommodation of said bank; that the German-American National Bank is insolvent, and has been placed, in pursuance of law, in the hands of a receiver to be wound up. And this defendant denies that the plaintiff can recover anything against him on said note, and claims to recoup the amount of said note, principal and interest, by reason of the wrongful action of the plaintiff.

FRANCIS MILLER,
Attorney for Deft. Donaldson.

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ AND OTHERS.

Affidavit of Defendant R. B. Donaldson.

Robert B. Donaldson, having been duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and that he is informed and believes and offers to prove that the note sued on herein was made under the following circumstances, to wit: That prior to the date of said note the defendants Hitz and Mattingly and this affiant, for the accommodation of the German-American National Bank of the city of Washington, D. C., made their note to the defendant Prentiss for $10,000, which note was indorsed by the said Prentiss and was discounted by the plaintiff, and the proceeds thereof paid to and used by the said German-American National Bank; that at the time of the discounting of said note by the plaintiff the said German-American National Bank, by its cashier, deposited with the plaintiff, as collateral security for the payment of said note, shares of stock in the said National
107 Metropolitan Bank and the German-American Fire Insurance Company, amounting in the aggregate to $11,000, then held by the said German-American National Bank; that the said note was paid at maturity, and the said stocks were retained by the plaintiff for future loans; that on the —— day of ——, 187–, the defendants Hitz and Mattingly and this affiant made the note sued on for the accommodation of the said German-American National Bank to the defendant Prentiss, who indorsed the same, and it was discounted by the plaintiff, and the proceeds thereof were paid to and used by the said German-American National Bank; that the said securities remaining as aforesaid with the plaintiff were pledged to it by the said German-American National Bank as collateral security for the payment of said last-mentioned note, but the said plaintiff allowed said collaterals to be withdrawn

as security for said note after it had been discounted by the plaintiff, and to be applied to other purposes, without the knowledge or consent of this affiant; that the said security was amply sufficient to have paid the said note and interest in full, and would have done so if said plaintiff had retained it and applied it, as it was in duty bound to do, to that purpose. This affiant further states that the plaintiff was fully informed and aware of the fact that the said note was made and indorsed by the defendants solely for the accommodation of the said German-American National Bank, and that the proceeds thereof went to its use.

This affiant further states that the said German-American National Bank is insolvent, and has been placed by the Comptroller of the Currency in the hands of a receiver to have its business wound up.

R. B. DONALDSON.

Sworn to and subscribed before me, this 18th day of April, A. D. 1879.

[L. S.] JOHN T. CLARK,
Notary Public.

108 *Pleas of Defendant Mattingly.*

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK of Washington
vs.
JOHN HITZ ET AL. } No. 20,351. At Law.

The defendant William F. Mattingly for pleas says:

1st. That he did not undertake and promise as alleged.

2d. That he never was indebted as alleged.

3d. That he did not make said promissory note as alleged.

4th. That said note sued on was made for the accommodation of the German-American National Bank of Washington City, (a body corporate under the laws of the United States,) as was well known to the plaintiff, and was discounted by the plaintiff for that bank, and the proceeds thereof went to said bank, which, prior to the institution of this suit, was, in pursuance of law, placed in the hands of a receiver. That to secure the payment of said note the plaintiff held certain stocks, to wit, $5,000 of German-American Fire Insurance Company stock and $6,700 of The National Metropolitan Bank stock, of the value of $12,000 and upwards, left with it by the cashier of said German-American National Bank as the property of said bank.

That the plaintiff illegally and wrongfully permitted said stock so held by it as security as aforesaid to be withdrawn without the consent of the defendants or of said German-American National Bank, and to be applied as collateral security for loans made by it to cer-

tain individuals on their personal notes and for their personal use, and refuses to apply the same to said note sued on, for which the same was held as security as aforesaid. And the defendant avers that he is damnified by the illegal conduct of the plaintiff as aforesaid to the extent of the amount claimed on said note sued on, and claims to recoup the value of said stocks as aforesaid to the extent of the plaintiff's claim on said note.

WM. F. MATTINGLY,
Defendant.

109 William F. Mattingly, being duly sworn, deposes and says as follows:

I am one of the defendants in this action. I deny the right of the plaintiff to recover the whole or any part of the amount sued for. That said note sued on was made for the accommodation of the German-American National Bank of this city, as was well known to the plaintiff, and was discounted by the plaintiff for the said bank, and the proceeds thereof went to said bank. That the fact relating to the securities left with the plaintiff for said note and the illegal diversion of the same are fully set forth in my foregoing fourth plea; and I make oath to the same on information, and expect to prove the same on the trial of this action.

WM. F. MATTINGLY.

Subscribed and sworn to before me this 19th day of April, A. D. 1879.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG,
Assistant Clerk.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK, PLAINTIFF,
vs.
JOHN HITZ ET AL., DEFENDANTS.
} At Law. No. 20,351.

Motion for Judgment against defendants Donaldson, Prentiss, and Mattingly, under the 73d Rule of Court.

Now comes the plaintiff in the above-entitled case and moves that a judgment be entered against the defendants, Robert B. Donaldson, Charles E. Prentiss, and William F. Mattingly, under the 73d rule of the court, for want of a proper and sufficient affidavit of defense, and because the grounds of defense stated in the affidavit would not, if true, be sufficient to defeat the plaintiff's claim in whole or in part.

NATHANIEL WILSON,
Attorney for Plaintiff.

Please take notice that the above motion will be called up on Saturday, the 26th instant, at 11 A. M.

NATHANIEL WILSON.

To Wm. F. Mattingly, R. D. Mussey, and Francis Miller.

Service acknowledged this 23d day of April, 1879.

RIVES C. CURRAN, *for Wm. F. M.*
R. D. MUSSEY, *for Prentiss.*
FRANCIS MILLER, *for Donaldson.*

THE NATIONAL METROPOLITAN BANK *vs.* MATTINGLY ET AL. } At Law. No. 20,351.

Upon hearing the plaintiff's motion for judgment against defendants, Mattingly, Donaldson, and Prentiss, for want of sufficient affidavit of defense, the same is granted. Therefore, it is considered that the plaintiff recover against said defendants, Mattingly, Donaldson, and Prentiss, $10,000, with interest thereon at the rate of seven per cent. per annum from October 4, 1878, until paid, with $1.85 costs of protest, being the money payable by them to the plaintiff by reason of the premises, and $—— for its costs of suit, and have execution thereof. Appeal prayed by plaintiffs. (15 Minutes, p. 41.)

Order of Court in General Term setting aside Judgment and directing Trial.

NATIONAL METROPOLITAN BANK *vs.* HITZ ET AL. } At Law. 20,351.

DECEMBER 9, 1879.

Argument commenced yesterday as to sufficiency of the affidavits in support of the defendants' pleas, resumed by Mr. Davidge in support of the affidavits, Mr. Nathaniel Wilson *contra;* whereupon, because the court is of opinion that the affidavits of the defendants Mattingly, Donaldson, and Prentiss that the cause ought to have been tried upon the merits of the said pleas, and that it was error in the special term to give judgment against said
111 defendants, notwithstanding their said pleas, therefore it is considered that the judgment of the said special term be, and the same is hereby, reversed, and that the cause be, and the same is hereby, remanded to the special term, that issues may be made upon said pleas and tried according to law. (3 Min G. T., p. 470.)

In the Supreme Court of the District of Columbia,
the 6th day of June, 1879.

THE NATIONAL METROPOLITAN BANK, PLAINTIFF,
vs.
JOHN HITZ ET AL., DEFENDANTS. } No. 20,351.

The President of the United States to the Marshal for said District, greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of the defendant Hitz, you cause to be made $10,000, with interest at 7 per cent. from October 14, 1878, till paid, $1.85 cost of protest, which the plaintiff lately, by the judgment of said court in the above-entitled cause, recovered against said defendant, for money found payable to said plaintiff, and $26.90 for costs and charges about said suit expended, as appears of record, and return this writ into the clerk's office of said court within sixty days, so indorsed as to show when and how you have executed the same. Witness: D. K. Cartter, chief justice of said court.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG, *Ass't Clerk.*

(Indorsed:) No. 20,351; National Metropolitan Bank *v.* John Hitz *et al.*; *fi. fa.* issued June 6, 1879; returned , 187 . Judgment, $10,000; interest, 7 per cent., from October 14, 1878, $; protest, $1.85; costs, $26.90. Levied as per schedule, June 7, 1879; F. Douglass, marshal; Nath'l Wilson, attorney.

112 In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ ET AL. } 20,351. At Law.

Schedule of Levy under Fieri Facias.

I, Frederick Douglas, U. S. marshal, D. C., do hereby certify that I have, this 7th day of June, 1879, levied upon all the defendant's right, title, and interest in and to the following described real estate, together with all and singular the improvements thereon, to wit: Original lots one (1) and twenty (20) in square 143, and that part of original lot two (2) in said square described as follows: Beginning for the same at the southeast corner of said lot, running thence north along the east line of said lot 76 feet, thence west 5 feet, thence south 76 feet, thence east 5 feet to the place of beginning.

And original lot numbered 4 in square numbered 379; also that part of lot numbered 11 in square 403 bounded as follows: Beginning for the same on Eighth street at the dividing line of lot 10

and said lot 11, and running thence south along the line of Eighth street 40 feet, thence at right angles with said street ninety-nine (99) feet four inches to the rear line of the same north forty (40) feet, and thence along the rear line of the same north forty feet, and thence along the dividing line aforesaid east to the beginning —all in the city of Washington, District of Columbia.

FRED'K DOUGLASS, *Marshal.*

We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the marshal of said District, do hereby certify that we have appraised the property described in the foregoing schedule at fifty-three thousand three hundred dollars.

Given under our hands and seals this 7th day of June, 1879.

E. C. ECKLOFF. [SEAL.]
LEWIS O'NEAL. [SEAL.]
W. T. S. CURTIS. [SEAL.]

113 *Order referring cause to General Term for hearing in first instance.*

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK } In Equity.
v. } No. 6,822.
JOHN HITZ.

The order of the court passed herein on the 9th day of September, 1880, referring this cause to Mr. Justice Hagner, is hereby rescinded, and the cause is hereby certified to the Supreme Court of the District, in general term, to be there heard in the first intance.

(Signed) W. S. COX, *Justice.*

Endorsed: Filed Sep. 28, 1880. R. J. Meigs, Clerk.

114 *Decree pro confesso against Cross.*

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK, PLAINTIFF, }
vs. } Equity.
JOHN HITZ, JANE C. HITZ, SAMUEL CROSS, AND } 6,822.
William J. Metzerott. }

It appearing to the court that the defendant Samuel Cross was regularly served with process in the above cause on the 9 day of June, 1879, and that the time expired within which said defendant was required to answer or enter his appearance, and no appearance being entered or answer filed, it is this 7th day of February, 1881, ordered that a decree *pro confesso* be entered against said defendant Samuel Cross.

W. S. COX, *J.*

Endorsed: Filed Feb'y 7, 1881. R. J. Meigs, Clerk.

115 *Petition of Jane C. Hitz, praying dismissal of cause, &c.*

In the Supreme Court of the District of Columbia.

NATIONAL METROPOLITAN BANK
vs.
JANE C. HITZ ET AL. } Equity. No. 6,822.

The petition of Jane C. Hitz, one of the defendants in the above-entitled cause, respectfully shows to the court, upon information and belief, as follows:

First. That on the 4th day of March, 1864, the High Federal Council of the Swiss Confederation issued its commission to John Hitz, her husband, and one of the defendants in this cause, consul-general of that confederation "for the United States," and especially for the 3d district, "comprising the District of Columbia and States of Virginia, Maryland, and Delaware," and that on the 23d of September, 1864, said John Hitz was duly recognized by the Executive Department of the United States as such consul-general, and an *exequatur* in due form was executed and delivered to him by the United States; and that he has been ever since, and now is,
116 recognized as such "consul-general" by the United States, and that he has ever since performed and still continues to perform all the duties appertaining to said public office of said confederation in the United States.

Second. On or about the 28th day of February, 1868, the said Federal Council of the Swiss Confederation issued its credentials or letters of credence by which it appointed the said John Hitz "political agent" of the Swiss Confederation near the government of the United States of America, and thereby conferred upon him the title and rank appertaining to that office; that on or about the 2d day of April, 1868, the said John Hitz was duly recognized as such "political agent" by the Executive Department of the United States, and still is so recognized, and that ever since said date he has performed and still continues to perform all the duties appertaining to that office in the United States. The said John Hitz was born in Switzerland, and was or claimed to be (at the time mentioned and now) a citizen of the Swiss Confederation.

Third. The duties appertaining to the said office consist in
117 the management of all the matters and affairs in the United States, commercial or otherwise, appertaining to and concerning the Swiss Confederation and the subjects of said confederation, and in the exercise of a general supervising power and authority over the consuls, vice-consuls, and consular agents of the said confederation in the United States. The said office of "political agent" is the office highest in rank known to or established by the laws of the Swiss Confederation amongst her representatives in the United States of America, and the office of consul-general is

next in rank thereto; and she is advised by counsel and believes, and therefore avers, that said John Hitz is now and has been, since the said 30th day of March, 1868, a public minister, within the meaning and purview of section two of Article III of the Constitution of the United States, and duly accredited and appointed as such from the Swiss Confederation, a foreign power and government, to the government of the United States, and that said John Hitz has been so recognized and is now recognized as such
118 public minister in the United States by the government of the United States.

Fourth. At the time when the promissory note mentioned in the original bill in this cause was made, to wit, on the 14th day of October, 1878, and at the time when this action at law was instituted thereon, as well as when the judgment thereon was rendered, and as well as when the bill in this cause was exhibited, the said John Hitz was the chief representative in the United States of the Swiss Confederation and such public minister as aforesaid; and she is advised by counsel and believes, and therefore she avers and charges, that said Hitz was not subject to any jurisdiction or suable in the Supreme Court of the District of Columbia in manner and form as appears in and by the pleadings in this cause, and that the said judgment by default for $10,000, which appears of record against said John Hitz and in favor of said complainant, as of the date of April 28, 1879, is null, void, and of no effect. She
119 is advised by counsel and believes, and therefore says, that by virtue of the provisions of the Constitution of the United States original and exclusive jurisdiction over all cases affecting embassadors, other public ministers and consuls, is vested in the Supreme Court of the United States, any statute to the contrary notwithstanding.

Your petitioner files herewith copies of the following described papers, letters and documents, to which she begs leave to refer as part of this her petition, to wit:

1. Commission of John Hitz as consul-general of the Swiss Confederation;

2. Exequatur thereon;

3. Certificate of present recognition as such consul;

4. Commission as "political agent" in the United States of John Hitz; and

5. Letter of Secretary of State of the United States fixing time for recognition of same.

Your petitioner therefore prays that she may have the same benefit of the matters and things herein set forth as if they
120 had been contained in her answer to the original bill herein, and that said judgment at law against John Hitz may be declared to be null and void and that the bill of the said complainant in this cause may be dismissed with costs, and that she

may have such other and general relief in the premises as she may in equity and justice and according to law be entitled to have.

JANE C. HITZ.

ENOCH TOTTEN,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, } ss:
COUNTY OF WASHINGTON, }

I, Jane C. Hitz, being first duly sworn, do depose and say that I am the defendant named in the abave-entitled cause, and who signed the foregoing petition; that I have read said petition and know the contents thereof, and that the facts therein stated on my own knowledge I know to be true, and that the facts therein
121 stated on information and belief I believe to be true.

JANE C. HITZ.

Subscribed and sworn to before me this 11th day of April, A. D. 1881.

HUGH T. TAGGART, [SEAL.]
Justice of the Peace.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs, clerk.

122 *Commission of John Hitz as Consul-General Swiss Confederation.*

Le Conseil Fédéral de la Confédération Suisse fait savoir par les présentes:

Qu'en vertu des pouvoirs que lui sont conférés à teneur de l'article 90 de la constitution fédérale
il a nommé
Monsieur John Hitz, de Davos Canton des Grisons, Consul-Général de la Confédération Suisse à la residence de Washington, en remplacement de Mr. son père décédé pour les Etats-Unis de l'Amerique du Nord et spécialement pour le III Arrondissement comprenant le District de Columbie et les Etats de Virginie, Maryland et Delaware.

En donnant à Monsieur John Hitz, charge et pouvoir de protéger selon les lois de Etats-Unis de l'Amerique du Nord et les usages en vigueur entre nations commercantes et amies, les personnes, les affaires et les propriétés des Suisses dans les dits Etats en général et dans son arrondissement consulaire en particulier, on qui s'y trouvent, soit en voyage, soit en séjour on qui fout
123 des operations de négoce avec ce pays, le Conseil Fedéral prie le Governement de l'Union Americaine et tous magistrats, juges et officiers civils et militaires de reconnaitre Monsieur John

Hitz en qualité de Consul-Général, de la faire jouir des droits attachés aux emplois consulaires et d'avoir égard aux demands et recommandations qu'il serait dans les cas de leur adresser en vertu des ses fonctions.

En foi de quoi les présentes out été signées par le President de la Confédération Suisse contrésignées par le Chancelier et scellées du scean du Conseil Fédéral.

Fait à Berne le quatre Mai Mil huit cent soixante quatre. (4 Mai, 1864.)

Au nom du Conseil Fédéral Suisse :

Le Président de la Confédération,

(Sg.) DR. J. DUBS.

{ Scean du Conseil Fédéral } Le Chancelier de la Confédération,

(Sig.) SCHIESS

Translation.

The Federal Council of the Swiss Confederation by these presents proclaims: That by virtue of the powers conferred upon it by article 90 of the federal constitution,—

124 Mr. John Hitz, of Davos, Canton of Grisons, is herewith appointed Consul-General of the Swiss Confederation, with residence in Washington, to replace his deceased father, for the United States of North America, and especially for the IIIrd district, comprising the District of Columbia and the States of Virginia, Maryland, and Delaware.

In conferring upon Mr. John Hitz the charge and the power to protect, in conformity with the laws of the United States of North America and the usages in force among commercial and friendly nations, the persons, the interests, and the property of Swiss who reside, travel, or sojourn, or who are engaged in commerce in said United States generally, and more especially in his consular district, the federal council solicits the government of the American Union and all the magistrates, the judges, and the civil and military officers, to recognize Mr. John Hitz in his capacity as consul-general, to accord him the rights vouchsafed to consular offices, and to consider such demand or recommendations as he may present to them by virtue of his functions.

In virtue whereof these presents have been signed by the president of the Swiss Confederation, countersigned by the chan-

125 cellor, and provided with the seal of the federal council.

Done at Berne, the fourth day of May, one thousand eight hundred and sixty-four, (May 4, 1864.)

In the name of the Swiss Federal Council:

The President of the Confederation:

(Sig.) DR. J. DUBS.

The Chancellor of the Confederation:

{ Seal of the Swiss Federal Council. } (Sig.) SCHIESS.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs, clerk.

126 *Exequatur of John Hitz, Consul-General of the Swiss Confederation.*

Abraham Lincoln, President of the United State of America:

To all whom it may concern. Satisfactory evidence having been exhibited to me that John Hitz has been appointed consul-general of the Swiss Confederation, to reside at Washington, I do hereby recognize him as such, and declare him free to exercise and enjoy such functions, powers and privileges as are allowed to consuls generally by the law of nations, or by the laws of the United States and existing treaty stipulations between the government of Switzerland and the United States.

In testimony whereof I have caused these letters to me made patent, and the seal of the United States to be hereunto affixed.

Given under my hand at the city of Washington, the 23d day of September, A. D. 1864, and of the Independence of the United States of America the 89th.

[SEAL] (Signed) ABRAHAM LINCOLN.

By the President:

(Signed) WILLIAM H. SEWARD.
Secretary of State.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs, clerk.

127 *Certificate of the Department of State recognizing John Hitz as Consul-General of the Swiss Confederation.*

UNITED STATES OF AMERICA, DEPARTMENT OF STATE. } No. 192.

To all whom these presents shall come, greeting:

I certify that John Hitz was duly recognized by this government as consul-general of Switzerland, in Washington, on the 23d day of September, 1864, and is so recognized now.

In testimony whereof, I, James G. Blaine, Secretary of [SEAL] State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this 9th day of April, A. D. 1881, and of the Independence of the United States of America the 105th.

JAMES G. BLAINE.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs.

128 *Commission of John Hitz as Political Agent.*

BERNE, le 28 Février, 1868.

Animé du désir de resserrer toujours d'avantage les lieus d'amitié et de développer de plus en plus les bonnes relations heureusement,

existantes entre la Suisse et les Etats-Unis d'Amerique, le Conseil Fédéral voulant en même temps donner une marque particulière de sou estime au Gouvernment de l'Union, a conféré aujourd'hui à Monsieur John Hitz, sou Consul-Général à Washington, le titre et la qualité d'Agent Politique de la Confédération Suisse près le Gouvernment des Etats-Unis d'Amerique. En ayant l'honneur d'en informer Monsieur William H. Seward, Ministre Secrétaire d'Etat pour les Affaires Etrangérs des Etats-Unis d'Amerique, le Conseil Fédéral prie sou Excellence de bien vouloir reconnaître Monsieur John Hitz en sa susdite qualité et d'ajouter foi et créance à tout ce qu'il Lui exposera au nom du Gouvernment Suisse surtout lorsqúil sera l'organe des sentiments d'amitié et des vive sympathies qu'il professe pour le Gouvernment dé l'Union Américaine
129 et ses institutions.

Le Conseil Fédéral saisit avec empressment cette occasion pour offrir à soù Excellence Monseiur William H. Seward les assurances de sa haute consideration.

Au nom du Conseil Fédéral Suisse:

Le Président de la Confédération:
(Sig.) DUBS.

Le Chancelier de la Confédération:
(Sig.) SCHIESS.

Son Excellence Monsieur William H. Seward, Ministre Secretaire d'Etat pour les affaires Etrangères des Etats-Unis d'Amerique, &c., &c., à Washington.

Translation.

BERNE, *February* 28, 1868.

Animated by the desire to continually strengthen the ties of friendship and to develop more and more the good relations happily existing between Switzerland and the United States of America, the Federal Council being anxious at the same time to give to the Government of the Union a special proof of its esteem, has this day conferred upon Mr. John Hitz, its Consul-General at Washington, the title and rank of a Political Agent of the Swiss Confederation, near the Government of the United States of America.

130 In doing itself the honor to thus inform Mr. William H. Seward, Secretary of State of the United States of America, the federal council begs his excellency to recognize Mr. John Hitz in his above-mentioned capacity and to attribute faith and credence to whatever he may submit to him in the name of the Swiss government, especially when acting as the exponent of the sentiments of friendship and the lively sympathies entertained for the government of the American Union and its institutions.

The federal council gladly embraces this occasion to present to

his Excellency Mr. William H. Seward, the assurances of its high consideration.

In the name of the Federal Council of Switzerland:

The President of the Confederation:

(Sig.) DUBS.

The Chancellor of the Confederation:

(Sig.) SCHIESS.

To his Excellency, Mr. William H. Seward, Secretary of State of the United States of America, &c., &c., at Washington.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs, clerk.

131 *Letter of Secretary of State notifying John Hitz when to present his Commission as "Political Agent" of Swiss Confederation.*

DEPARTMENT OF STATE,
WASHINGTON, *March 30th*, 1868.

SIR: Your note of yesterday informing me of your appointment, by the High Federal Council of Switzerland, as *Political Agent* to the United States, and requesting the appointment of a time for you to present your letter of credence in that capacity, has been received.

In reply, I have the honor to inform you that I will be happy to receive you for the purpose indicated on Thursday next, the 2nd proximo, at 12 o'clock M.

I have the honor to be, sir, your obedient servant,

(Signed) WILLIAM H. SEWARD.

To John Hitz, Esq., &c., &c., &c., Washington, D. C.

Endorsed: Filed Apr. 11, 1881. R. J. Meigs, clerk.

132 *Petition for a Rehearing.*

In the Supreme Court of the District of Columbia, in General Term, April 12, 1881.

NATIONAL METROPOLITAN BANK
vs.
JOHN HITZ, JANE C. HITZ, AND OTHERS. } Eq., 6,822.

The petition of Jane C. Hitz respectfully prays that a rehearing may be ordered by this court in the above-entitled cause, by a full bench, or, at least, five judges, and for reasons assign the following:

First. The cause was ordered to be heard in general term in the first instance, and was argued before three judges, and only two of the three concur in the decree directed to be prepared.

Second. Since the argument the petition of this petitioner praying a dismissal of the bill because John Hitz, her husband and co-

defendant, was before and at the time of the judgment at law, and still is, a public minister of a foreign court accredited to and
133 recognized by the proper officer of the United States, has been filed and no argument thereon has been had.

Third. The questions involved in the original bill and proceedings are of great importance to the people of this District, and the matters involved in the said petition are of material importance and deserve mature consideration.

JANE C. HITZ,
By E. T., *her Atty.*

ENOCH TOTTEN,
Solicitor for said Jane C. Hitz.

Endorsed: Filed Apr. 12, 1881. R. J. Meigs, clerk.

134 *Final Decree of the General Term, April* 13, 1881.

In the Supreme Court of the District of Columbia.

THE NATIONAL METROPOLITAN BANK, PLAINTIFF, } Equity.
vs. } No. 6,822.
JOHN HITZ ET ALS., DEFENDANTS.

Filed April 13, 1881.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration—

It is ordered, adjudged, and decreed, that the conveyance made by the defendants, John Hitz and Jane C. Hitz, mentioned in the bill of complaint and in the answers in this cause, bearing date the ninth day of December, one thousand eight hundred and seventy-eight, and recorded in Liber No. 913, folio 437 *et seq.*, of the land records of the District of Columbia, to the defendants, William G. Metzerott and Samuel Cross, for the pieces and parcels of ground, with the improvements thereon, described in said conveyance, is, and the same is hereby declared to be, as to the plaintiffs in this cause, fraudulent and void.

It is further ordered, adjudged, and decreed, that the de-
135 fendant, John Hitz, as tenant by the courtesy initiate, has, for and during the term of his natural life, a freehold estate in those several pieces or parcels of ground described in the plaintiff's bill, situated and lying in the City of Washington, in the District of Columbia, described as follows: Original lots one (1) and twenty (20) in square numbered one hundred and forty-three (143), and that part of original lot two (2) in the same square, described as follows: Beginning for the same at the southeast corner of said lot, running thence north along the east line of said lot seventy-six (76) feet, thence west five (5) feet, thence south seventy-six (76)

feet, thence east five (5) feet to the place of beginning; also original lot numbered four (4) in square numbered three hundred and seventy-nine (379); also that part of lot numbered eleven (11) in square numbered four hundred and three (403), bounded as follows: Beginning for the same on Eighth street at the dividing line of lot ten (10) and said lot eleven (11) and running thence south along the line of Eighth street forty (40) feet, thence at right angles with said street ninety-nine (99) feet four (4) inches to the rear of said lot, thence along the rear of the same north forty (40) feet, and thence along the dividing line aforesaid east to the beginning; together with the improvements and appurtenances
136 to the said premises belonging or appertaining; which said estate, right, and interest is subject to sale to satisfy the plaintiff's judgment set forth in said bill of complaint.

It is further ordered, adjudged, and decreed, that the petition of Jane C. Hitz, filed on the 11th day of April, A. D. 1881, be and the same is hereby dismissed and overruled.

And from this decree the defendant and petitioner, Jane C. Hitz, prays an appeal in open court to the Supreme Court of the United States.

By order of the court:

D. K. CARTTER,
Chf. Just.

Endorsed: Filed Ap. 13, 1881. R. J. Meigs, clerk.

137 In the Supreme Court of the District of Columbia, the 23d day of May, 1881.

THE NATIONAL METROPOLITAN BANK
vs.
JANE C. HITZ ET AL. } No. 6,822 Equity. In Error.

Know all men by these presents, that we, Jane C. Hitz, principal, and Elias E. White, surety, are bound unto the above-named National Metropolitan Bank in the sum of one thousand dollars ($1,000), to be paid to the said National Metropolitan Bank, its successors or assigns. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 23d day of May, 1881.

Whereas the above-named defendant, Jane C. Hitz, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Jane C. Hitz shall prosecute her said appeal to effect,

and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JANE C. HITZ. [SEAL.]
ELIAS E. WHITE. [SEAL.]

Sealed and delivered in presence of—

Approved May 31st, 1881.

A. WYLIE, *Justice, &c.*

And filed June 1, 1881.

(Endorsed on cover:) Dist. of Columbia Supreme Court. No. 254. Jane C. Hitz, appellant, vs. The National Metropolitan Bank. Filed 1st June, 1881.

IN THE

Supreme Court of the United States.

October Term, 1883.

NO. 254.

JANE C. HITZ,
Appellant,

vs.

THE NATIONAL METROPOLITAN BANK,
Appellee.

Brief For Appellant.

APPEAL FROM A DECREE OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ENOCH TOTTEN,
For Appellant.

R. O. POLKINHORN, PRINTER.

IN THE

Supreme Court of the United States.

October Term, 1883.

NO. 254.

JANE C. HITZ,
Appellant,

vs.

THE NATIONAL METROPOLITAN BANK,
Appellee.

Brief For Appellant.

APPEAL FROM A DECREE OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The bill in this cause was filed June 9, 1879, and alleged: That the complainant, on the 28th day of April, 1879, obtained a judgment against the defendant John Hitz, in the Supreme Court of the District of Columbia, for the sum of $10,000, with interest at seven per centum per annum from October, 1878, with costs; and that an execution had been issued thereon and returned "*nulla bona*," and that

the judgment remained unpaid, without personal property on which to levy.

That Jane C. Hitz was the lawful wife of John Hitz, and that they had children, who are lawful issue, and capable of inheriting from the said defendants; that during the coverture Jane C. Hitz was and is the owner in fee of certain real estate in the city of Washington.

That by reason of the premises the defendant John Hitz had a life estate in the property and the rents thereof during the joint lives of himself and his wife, *and is entitled to collect the profits of said lands*, and that his interest is subject to execution at law. (3.)

That John Hitz, by a deed dated December 9, 1878, and recorded in Liber 913, conveyed the said estate belonging to him to William G. Metzerott and Samuel Cross (which deed was recorded 13 May, 1879), in trust, for the exclusive use of Jane C. Hitz, with power to dispose of the property as she may direct.

That such deed was voluntary and without consideration, and with intent to hinder and delay the creditors of said John Hitz.

That on the 6th of June, 1879, another execution was issued, and had been levied upon said lands and the estate of Hitz therein, and the complainant claims that it has a specific lien thereon by virtue of such levy, but that the obstruction created by said deed prevents a sale, at a fair valuation.

That said trusts have not been accepted by the said trustees, and that the deed has not been executed, delivered, or completed by the grantees, but was put in the hands of Metzerott *in escrow*, to be held by him until certain transactions between the said John Hitz and the German American National Bank should be closed up, and that the deed was obtained by Jane C. Hitz from Metzerott merely for safe keeping, and was by her fraudulently caused

to be recorded, and that said conveyance is fraudulent and void as to complainant.

The bill prays—

1. That defendants may disclose the true consideration and purpose of the deed of December 9, 1878.
2. That it may be set aside as void.
3. That a receiver may be appointed.
4. That proper writs may issue.
5. For general relief.

The answer of Jane C. Hitz was filed in 1879, and admits, on information and belief, the rendering of the judgment, &c, but avers that it was rendered on a note made jointly by Mattingly, Donaldson and Hitz, and endorsed by Charles E. Prentiss, and that on July 2, 1879, a judgment was rendered against all those defendants; that no execution has ever been issued against Donaldson, Mattingly or Prentiss; that Donaldson and Mattingly are solvent and amply able to pay the judgment, and that each of them have, in the District, sufficient property out of which the judgment could be made by execution.

The marriage and birth of the children is admitted; but she denies, on the advice of counsel, that the property is subject to be levied upon to pay any of the debts of John Hitz. She avers that the deed of Dec. 9, 1878, was fairly and properly made, and delivered, and recorded, for a good and sufficient valuable consideration, to wit: a house and lot worth 10 or 15,000 dollars, and that she joined in a deed of trust with Hitz to Keyser to secure the debts of Hitz to the German American National Bank.

She denies all the charges made against the legality of the deed of December 9, 1878, and its delivery and record, and especially denies that the deed was to be held in "escrow."

That she inherited from her father a large and valuable estate in both real and personal property, and that her husband has dissipated a large part of it, and that the property described in the bill is all that is left, except a modicum of personal property of small value.

That her mother, on her father's death, became entitled to one-third of the rents, &c., and that her mother died January 26, 1879.

That about November 1st, 1878, she took possession and has ever since continued in possession and in the exclusive control of all her real property inherited from her father.

She avers that the complainant has a full and adequate remedy at law.

That the valuable property on the corner of 9th and G streets, in this city, was involved in litigation owing to certain conveyances fraudulently procured from her by her husband.

That a large sum of money derived from the sale by John Hitz, of her separate personal property, was invested in certain lands, conveyed by Hitz and herself to Keyser, receiver, to secure the indebtedness of Hitz to the bank.

The answer of Hitz is substantially the same, except that it does not go into the matters in detail as to his dealings with her estate..

Statement of Facts.

From the pleadings and evidence it appears that the defendants, Jane C. Hitz (then Jane C. Shanks), and John Hitz intermarried on the 5th day of August, 1856. She was the only child of Michael Shanks, who died intestate May 20, 1864, leaving a widow and Mrs. Hitz, and a very large estate in real and personal property. The personal property for distribution, after discharging all claims and expenses, amounted to $105,562.01, of which one third ($35,187.33⅓) went to the widow, and the balance ($70-,

374.66⅔) was paid to the defendant, Jane C. Hitz. (See Ex. No. 3, account of administrator, 80–83.)

When John Hitz was married he owned no real property whatever, and his personal estate was small, being only several hundred dollars in value. (41.) The personal property inherited by Mrs. H. passed through the hands of her husband, and has all disappeared. (43–57.)

The husband asserts that it was "largely absorbed in repairing and improving the real estate," and "partially in traveling." He also says that some of the proceeds of her personal property were probably used to buy the real estate, in his name, on the corner of Pennsylvania avenue and Sixth street, southeast. (44.)

After the death of Shanks the management of all the estate which descended to Mrs. Hitz was in the hands of her husband until November, 1878, when she took possession of it, or of what was left of it, herself. Since then it has been in her exclusive possession, and her husband has had nothing whatsoever to do with it.

In 1873 the German-American Savings Bank was organized by Hitz and others, and Hitz was its president; afterwards, and in 18—, this Savings Bank was converted into a National Bank, called the German-American National Bank, of which Hitz was president. On the 30th of October, 1878, this bank failed, holding claims against Hitz amounting to over $100,000. (See Keyser's dep'n., 74.)

The complainant held a note, dated in October, 1878, for $10,000, made by Hitz and two other officers of this National Bank, payable to the order of its cashier, and by him endorsed to the complainant; the money obtained upon it was intended to be, and was, used by the German-American National Bank. Upon this note the complainant instituted a suit January 15, 1879, and on the 28th of April, 1879, judgment for $10,000, interest and costs, was taken by default against Hitz; the other parties to the note were all

included in the suit, but they defended, and not until July 2, 1879, was judgment rendered against them. This judgment was set aside by the Court in General Term, Dec. 2, 1879, and long after the bill and answers were filed. June 5, 1879, execution was issued against Hitz, and on the same day was returned "*nulla bona*." On the 9th of June the bill in this case was filed. No execution was issued against Mattingly, Donaldson, and Prentiss, although two of them are solvent and no supersedeas bond was filed on their appeal.

In November, 1878, Mrs. Hitz joined her husband in a trust deed to secure to the receiver of the bank the payment of such sum as might rest upon Hitz for his personal liability on his stock, by which a large number of lots, in which she had a dower interest, were conveyed. About the 9th of December, 1878, Mr. Hitz desired that Mrs. Hitz should convey to the receiver a valuable piece of improved property in the city of Washington, called the "New York House," which belonged to the estate of Michael Shanks. He had previously undertaken to convey it, but had failed to get her signature to the deed, although he had borrowed $15,000 on its security from the bank of which he was president. It was important to the husband that this defective conveyance should be perfected. She refused to make a deed unless her husband would convey, and secure, beyond doubt, to her separate use, all her estate remaining; he also refused to sign the trust deed for her benefit unless she should make the deed to the "New York House," and these two deeds were practically made and delivered at the same time. (50.) In consideration of this property, the parties joined in a deed, dated December 9, 1878, by which he conveyed whatever right he had in the property of her father's estate to Metzerott and Cross. (47.)

This deed was not recorded until May 13, 1879; it is charged that it is improperly recorded; that it was agreed

that it should be held in *escrow* until all the indebtedness of Hitz to the insolvent National Bank should be paid. The proof does not sustain these averments. Mr. Metzerott says it was so agreed between him and Mrs. Hitz—he don't pretend that Hitz himself entered into this agreement, and Hitz swore positively that he knew nothing of any such understanding. (50.) Mrs. Hitz denies most positively that any such agreement was made by her. The only thing said about this matter was by Mr. Cox, the counsel, that in consequence of the prevalent excitement, to record it then would create a bad impression, and he thought it would be better to hold it temporarily (61). This pretence that the deed was an *escrow* is plainly unreasonable. Hitz owes between eighty and one hundred thousand dollars, and, of course, can *never* pay the debts. If the averments of the complainant are true, the deed of May 9, 1878, was a cheat and a mockery, so far as Mrs. Hitz was concerned.

The property involved in this litigation stands in the name of Michael Shanks.

Assignment of Error.

The Court below erred—

First. In declaring that the deed of December 9, 1878, from Hitz and wife to Metzerott and Cross, was void as to the complainant;

Second. In holding that John Hitz had an estate in his wife's realty, subject to be sold to pay the debt of the complainant;

Third. In holding that the Supreme Court of the District of Columbia had jurisdiction to entertain an action at law and to render judgment against John Hitz, who was, at the time, the regularly accredited "Public Minister" of the Swiss Confederation to the United States, and had been received and was then recognized by the Executive Department of the United States as such.

Fourth. That, being an alien, he had an interest in the property in question, by virtue of his marital relations.

Points and Authorities.

I.

The complainant had a full and complete remedy at law, and cannot maintain this bill.

The bill was filed June 9, and on the 2d of July, and before the answers of Mrs. Hitz and her husband were filed, judgment had been rendered against the other three defendants also. The other parties, or two of them at least, were perfectly solvent and able to pay. A court of equity, in a case of this kind, in which a creditor is pursuing the separate estate of a married woman to collect the debts of an improvident husband, by him incurred as a surety, should require the creditor to exhaust all the remedies at law against the other defendants before applying to a court of equity. In the next place if the judgment became a lien on an interest of Hitz, in his wife's property, then there certainly was a complete remedy at law.

By the act of Congress of April 10, 1869, (16 Stat., 45,) the marital interest of the husband according to the common law was wholly taken away. That statute is as follows:

"AN ACT *regulating the Rights of Property of Married Women in the District of Columbia.*

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled*, That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but

such married women may convey, devise, and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 2. *And be it further enacted*, That any married woman may contract and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

The language of this statute is sweeping in its terms and necessarily includes *all* married women. It does not speak of women *thereafter* to be married, or of the property thereafter to be acquired. The language is that *any married woman* in the District shall have as absolute a right to *any* property belonging to her *when* she was married, or afterwards acquired, "as if she was unmarried." The statutes of nearly all the States on this subject distinguish between the women already married and those "hereafter" to be married, and as most of such statutes ante-dated this one it must be presumed that these statutes were before Congress when our law was under consideration; and if it had been intended to limit the operation of the statute to future marriages or to future acquisitions of property, the law would have been made to say so. If the statute applies only to after acquired property, does it also apply only to marriages celebrated after the date of the act? The father of Mrs. Hitz died in 1864, and whatever title she had when the act was passed descended upon her in 1864. If her rights to this real property was by this statute made "as absolute as if she were unmarried," then creditors can have no right affecting the property. If her rights were not as

absolute as if she were unmarried, the act does not mean what it says. The legislature declares one thing and the court below has declared another. This rule, of the common law, regulating the relations of the husband to the wife's freehold estate, was an evil well known to all. It had its foundation in a barbarous age, and is wholly unreconcilable with an enlightened sense of justice and the civilization of the age in which we live. The reason for the rule has long ago passed away, and there is no good reason why the rule itself should survive. It had its origin in the feudal ages, and was established because, in the first place, women possessed no rights which men were bound to respect; and, in the second place, because the man could, and the woman could not, bear arms in support of the feudal law. This statute therefore may well be called a remedial statute, and it is therefore entitled to a liberal construction. It was intended to remove a blot on our system of laws as applicable to the property and rights of married women. It was made to operate upon two classes of property: (1) *any property*, personal or real belonging to her (*any* married woman) at the time of marriage, and (2) *any* property, personal or real, acquired by her during marriage in any other way than by gift or conveyance from her husband.

These two classes of property are disposed of by the statute in the following manner:

1. It shall be the wife's "as absolute as if she were *femme sole*."

2. It "shall not be subject to the disposal of her husband."

3. It shall not "be liable for his debts."

4. The wife "may convey, devise, or bequeath the same, *or any interest therein*, in the same manner and *with like effect* as if she were unmarried."

5. She may contract, sue and be sued in reference to this

property, and her husband is not liable on such contracts, or in such suits.

The Court below, in the very able opinion of the Court, (1 Mackey, 111,) argued that when this act became a law the life estate of Hitz was fixed—held *in his own right*—and that the word "property" in the statute did not refer to his interest in the estate, but to her reversion after his death or the termination of the coverture. If this is true, then the appellant had no present interest whatsoever in this "property," which all agree descended to her. The "property" which descended to her was the lot of ground in question and all that was on it or in it. The "property" which she "acquired" when her father died was the *whole estate* which had belonged to her ancestor. But if what the court below holds is the correct view of the law, the appellant could not "convey, devise or bequeath that property nor any interest therein," as the statute says she may. Her husband, says that court, had *an interest* in that property which she *could not* so dispose of.

It may, and doubtless will be, argued, that this marital interest, which the common law gave the husband, was in this case a "vested" right and could not be taken away from him by legislation. But it will not be overlooked that the injured party, if there is one, is not making any objection but has in many ways waived his marital rights (if he had any) in this property. But was the interest of Hitz in this property of such a nature as to become a "vested" right? The estate was rented and Hitz collected the rents for his wife, and was entitled, as installments thereof fell due, to reduce them to possession if he choose so to do, up to the date of the passage of this married-woman's act.

The argument is made, in the opinion of the court below, and with some force, too, that this statute did not operate upon the estate of Mrs. Hitz at all; it is said that she had none and could not have any at the common law, until

the death of her husband or the end of the coverture. It was contended that he owned the use of the estate during his life, and hence that this "property," which this creditor is seeking, was his and not her's. This is strange, if true. When her father died the property went somewhere; it will not be contended that it descended from the ancestor to the husband. It must be conceded that the whole estate, the present and the future, as well as the fee, passed from the ancestor to the heir. This being conceded, then it should seem that the most the husband could take was the right to collect the rents and reduce them to possession as they fell due. Whether or not he had any property in the rents *in future*, depended on the continuance of the existing state of affairs. This was his estate by the courtesy initiate. The estate of the husband by the courtesy in the event of his wife's death, is a wholly different estate.

The precise rights of a husband in the real property of the wife have been variously defined, but the true rule has been stated by Mr. Bishop in his work on the law relating to married women. He states it in these words:

> Marriage "gives to the husband a claim in law upon all the wife's personalty in possession and upon all her subsequent acquisitions thereof. But it does not give him any upon possibilities of this sort lying in the future. Out of these propositions we deduce the true doctrine governing her title to her real estate. The rents and profits of her land *when they fall* due accrue to him; that is the money received for such rents and profits is his money, and he is entitled to sue in his own name, if he chooses, for the recovery of whatever is not voluntarily paid." (1 Bishop's L. of Married Women, § 536.)

Now, in what had the husband an "absolute vested" estate? In the income of the estate after the same had accrued and come to his hands, or an absolute vested right in

rents, past, present, and future? Certainly not in the future income, because that could be taken away in several ways. For instance, by a divorce *a vinculo*, for any cause; by a wrongful alienation, by levying a fine importing a grant in fee, suffering a common recovery, &c. (4 Kent, 34; *Porter* vs. *Porter*, 27 Grattan, 599; *Wheeler* vs. *Hotchkiss*, 10 Conn., 225; *Hays* vs. *Henderson*, 7 Bush., 489; *Wright* vs. *Wright*, 2 Md., 453; *Starr* vs. *Pease*, 8 Conn., 540.) This right or interest cannot, therefore, be said to be "vested" in the husband as to the future fruits of the esate. Upon a divorce, the rights of all creditors, except those who had secured a *specific lien*, would be held to be subordinate to the wife's rights.

In the case of *Magwire* vs. *Magwire* (7 Dana, 183) the court says:

> "Marriage, though in one sense a contract, because being both stipulatory and consentual, it cannot be valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*, and unlike an ordinary or commercial contract, and is *publici juris*, because it establishes fundamental and most important domestic relations and, therefore, every well-organized society is essentially interested in the existence, and harmony and decorum of all its social regulations and are controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good or justice to both or either of the parties will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint or foreign control consistently with the public welfare, and, therefore, marriage being much more than a contract and depending essentially on the sovereign will, *is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligations of contracts.* The obligation is created by the public law, subject to

> the public will, and not to that of the parties, so far as a dissolution of a marriage by public authority may be for the public good. It may be the exercise of a legislative function, but so far as it may be for the benefit of one of the parties in consequence of a breach of the contract by the other, it is undoubtedly judicial; and when thus altogether judicial, it may be beyond the authority of a Kentucky legislature, which, under our State constitution, cannot exercise any power clearly and purely judicial." (See *Robinson* vs. *How*, 13 Wis., 385.)

Freeman, in his work on judgment, says:

> "The right of a wife to her property, after a violation by the husband of his marital obligations, is superior to the lien of any judgment rendered against him after such violation, and secures to her the immediate use of her lands free from such lien, upon her substantiating her right by procuring a decree of separation for the misconduct of her husband. The rights of the wife cannot be enforced against a *bona fide* purchaser without notice, under a sale made before the filing of the bill for separation."—(*Van Duzer* vs. *Van Duzer*, 6 Pai. Ch., 366; *Sackett* vs. *Giles*, 3 Barb. Ch., 204.)

In the case of *Van Duzer* vs. *Van Duzer* the chancellor says that a husband who is guilty of such misconduct as will entitle the wife to a divorce or separation, loses his marital interest in her estate, and that the forfeiture relates back to the date of the offence, so as to cut out all judgment creditors who have not "obtained a specific lien upon the property without notice" of her rights. This doctrine was fully endorsed by the same court in *Sackett* vs. *Giles*. And in cases of improvidence or dissipation on the part of the husband, a court of equity will interpose and compel a settlement for the support of the wife and her children out of the wife's estate.

In the case of *Rugh* vs. *Ottenheimer* (6 Oregon 231,) the facts were, that Mrs. Rugh, prior to her marriage, purchased a farm, but it was not deeded to her until after her mar-

riage. Subsequently the constitution of Oregon was adopted, which contains (sec. 5, art. 18) this language:

> "The *property* and pecuniary rights of every married woman, at the time of marriage or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband."

Held, that this provision prevented the husband's creditors from proceeding against her estate, and exempted it from his debts and contracts.

The court, in deciding the case, said that "it was a fiction of the common law that husband and wife were one person, and the legal rights of the wife on marriage became merged in the husband," and that if the above provision "was right and proper in cases of future marriages, or of property acquired in future, it is also right and proper to apply it to the lands of persons then married, unless such a construction cannot be given it. Against such a construction it is claimed that the husband, by the common law, became on marriage invested with a free-hold in the land of the wife, which estate continued for their joint lives. This estate, however, was conditional and subject to be defeated by a divorce *a vinculo*. The marriage contract, out of which this estate arose was, at common law, one in which the state was interested and over which it exercised legislative control. It was both *sui generis* and *publici juris*.—(Cord on Rights of M. W.; 1 Kent, *n. a.*; *Magwire* vs. *Magwire*, 7 Dana, Ky., 183; Schooler's Dom. Rel., 300; 2 Bishop's L. of M. W., 32, 35, 43; *Sharpless* vs. *West Chester*, 1 Grant, 257; Buchanan's Estate, 8 Calif. 507; 6 Oregon, 231; *Kelly* vs. *Owen*, 7 Wall., 497; *Randall* vs. *Kreiger*, 23 Wall., 149.)

In *Thompson* vs. *Cundiff*, (11 Bush., 570,) an act of the State legislature, regulating life insurance in reference to insolvent debtors, was held to apply to antecedent policies,

and in *White* vs. *Hildreth*, (32 Vt., 265), the marriage took place prior to 1844. In that year the wife's father conveyed to him a small farm. In 1847, an act was passed by the legislature of Vermont exempting from execution and attachment the rents, issues and profits of the real estate of any married woman, and "the interest of her husband" therein, and this law applied to such real estate as belonged to her before marriage, or was acquired by gift, grant, devise or inheritance. A creditor sought to reach the rents of this property in the hands of a tenant, but the court held that they were protected by the statute.

One of the reasons most strongly urged in enforcing the constitutional prohibition against depriving a person of property or rights without due process of law, is that such an act is contrary to natural justice. Now, the present proceeding on the part of this corporation is itself inequitable and contrary to natural justice. The enforcement of this statute for the protection of married women, in this case will be in full accord with every principle of natural justice. The complainant did not give Hitz credit on the strength of his wife's estate. The note upon which the judgment was obtained was made for the sole benefit of the bank, and it was made nearly ten years after the "married women's act" went into effect. The bank had no vested rights as to the property of the wife, and there can be no natural justice in compelling her to pay the debt for which her husband, at most, was but one of several sureties.

It is hardly necessary to say that the constituional prohibition against laws impairing the obligation of contracts has no application to Congress nor to the District of Columbia.

A court of equity will not force a husband to assert his marital rights in favor of his creditors. The husband is not, in this case, complaining that his "vested" rights have been taken away, or that his constitutional rights have been in

any way violated; quite the contrary; he declares he never had any rights in regard to this property, except those allowed him by his wife, and that he neither has nor claims any now. Can this bank, whose debts originated long after the act of 1869, because a loser, come here and complain for him that *his* "rights" have been taken away, when *he himself* consents? Can this creditor compel him to rob his wife and children of that which never belonged to him, and hand it over to liquidate debts of this description?

A question closely allied to this was before the Circuit Court of the United States, and was decided by Chief Justice Marshall. The Chief Justice, in deciding the case of *Gallego* vs. *Gallego's Ex'r*, (2 Brock., 289,) used the following language:

> "We can find no case in which a husband has been considered a purchaser of the equitable interests, or *choses in action* of the wife, without some specific agreement by which he becomes so;' and the act of assembly contains no declaration to that effect. It would be unreasonable to put this construction on it by implication, because the consideration supposed to be given by law for her estate remains in the power of the husband. The court of chancery will not enable a freeman of London to obtain the personal estate of his wife without a settlement on her. Suits have been brought to assert the marital right of reducing her property into possession, but in no case that we have seen has her equitable right to maintenance been doubted. Were this a suit by the husband and wife for her legacy, the court would, certainly, on the application in England, without such application, direct a reasonable provision for her maintenance. As the case stands, the husband has relinquished his marital rights in this subject, and the question is whether a court of equity will disregard or control this relinquishment, in favor of creditors. As a general question, we can find no precedent for doing so. The husband has no interest in the legacy; he has only a power to make it his by

reducing it to possession. Till this power is exercised the property remains hers. We can find no case, in which creditors have required the aid of the court, to compel the husband to reduce it to possession, or in which a court has restrained the effect of a previous relinquishment of this marital right on the part of the husband. As a general proposition, we should consider this relinquishment valid against creditors; and if it is not so on the present occasion, its invalidity must be produced by the particular circumstances of the case.

* * * * * *

"In this case there is reason to believe that the husband is insolvent, and that he has relinquished to his wife that she may receive and enjoy the legacy bequeathed, secured from his creditors. In this there is no injustice; his creditors trusted to his own resources for payment of their claims, and had no right to count on the fortune of Mr. Gallego. Creditors, generally, therefore, cannot compel him to reduce the legacy of his wife to possession for their benefit." (See *Mann's Ex'r.* vs. *Higgins*, 7 Gill, 265.)

The court below refers for authority to the case of *Westervelt* vs. *Gray*, (12 N. Y., 212); the principle announced by the Court of Appeals of New York, in that case, as to the right of a husband to choses in action not reduced to possession, is in conflict with the decision of this court in *Price* vs. *Sessions* (3 How., 624). It must not be forgotten that the husband, himself, was there asserting his rights.

Hitz has always endeavored to keep his wife's property separate from his own, and has never undertaken to assert any dominion over it, except in subordination to her paramount authority (45–49). He kept separate accounts of the income and taxes of her estate, and maintained the distinction between her estate and his throughout. Early in Nov., 1878, he wholly ceased to have any dealings with her property and it was handed over to, and continued in, the exclusive possession of her sole agent, John Sherman—Hitz

thereby waived or disclaimed all interest in it. In December following, he joined in a conveyance of the realty. These acts amounted to a disclaimer of any tenancy which the law may have authorized him to assume. Such a disclaimer would estop him in an attempt to take it away from him, and his creditors can do no more than he could have done. A disclaimer of a tenacy is the act of a person in posession, who denies holding the estate from the person claiming to be the owner of it. (1 Bouvier Dic., 427; *Grubb* vs. *Grubb*, 10 B. & C., 816; *Whitehead* vs. *Pittman*, 2 Nev. & Man., 673.) A man may disclaim any right or title in equity, and an equitable disclaimer makes him, so far as the legal estate which may be in him, is concerned, a mere trustee for the person entitled. (See also, *Krill* vs. *Hamilton*, 102 U. S., 76.)

The husband acquiesced in the full operation of the act of 1869. At the date of that act, and long after it, he was perfectly solvent. Therefore subsequent creditors can not complain. The present appellee "gave credit to the debtor in the status which he had after the" statute became a law." (See *Graham* vs. *La Crosse* R. R., 102, U. S., 148.)

There is another view of this statute which is fatal to the claims of this creditor. The act declares distinctly that property descended, as did this, shall not "be liable for his (the husband's) debts." The debt upon which this judgment was obtained against Hitz originated October 14th, 1878, and the married women's act was passed in 1869. The debt was, therefore, created by the complainant with the law before its eyes. It is, therefore, neither unfair nor unjust to declare that this debtor is excluded by the act. The husband is not complaining, but is consenting. Without a *specific lien* no rights can be maintained. (*Lefeve* vs. *Witmer*, 10 Barr, 505.)

The authority of the legislature to exempt property from

the collection of debts which existed at the date of the act has not lately been doubted, and, *a priori*, it may exempt claims which have originated long since the act. (Cooley Con. Lim., 287; 2 Bish., § 34.)

These authorities show that the husband has a defeasible interest only in the income of his wife's real estate at the common law, and that this interest may be taken away from him by statute. But even if there be doubts as to the legislative power to take away these marital rights of the husband without his consent, there certainly can be no doubt about the legislative power to take them away with the husband's consent. In this case the husband gave his consent, and waived his rights both by act and by deed. He always treated her real estate as her separate property, and regarded himself as her agent in the management of it. (See *Aldridge* vs. *Muirhead*, 101 U. S., 397; *Coon* vs. *Rigden*, 4 Colorado, 275.) In November, 1878, he relinquished possession of all her property, and turned it over to her, and after that did not interfere with it. In December, 1878, he executed and delivered a formal conveyance of the property to trustees for her sole use and benefit. (See *Lefeve* vs. *Witmar*, 10 Barr, 505; 2 Bishop, §§ 34, 35.)

II.

The conveyance of December 9, 1878, by the husband and wife to trustees, is valid and effectual to secure the property to the wife, even if the act of Congress did not so secure it.

The charges in the bill against this deed are not sustained by the proofs. The complainant alleged that this deed was voluntary and without consideration, and to defraud creditors, and that it was only an *escrow*, and that its delivery for record was in violation of an agreement made contemporaneously with it.

The deposition of Metzerott, the only witness in support of the charge that the deed was an *escrow*, &c., says it was so understood between him and the wife; even he does not pretend that Hitz, the husband, made any such agreement. This complainant must not be permitted to forget that it is here on the theory that this woman occupies the position assigned to wives by the barbarities of the common law, and that in that attitude she could make no bargains whatever. But Mr. Hitz swears that he never heard of such a bargain until after the deed was on record, and Mrs. Hitz swears very positively that she made no such bargain. The pretence that the deed was only an *escrow*, needs no further notice.

The next charge against the deed is wholly unsupported by proofs of any kind on the part of the complainant. The defendants, on the other hand, have shown clearly that the deed was not only for an adequate and valuable consideration, but upon a fearfully excessive consideration; that it is all the wife has in lieu of about $60,000 of personal property, and about as much real property! The immediate consideration which moved at the time was the conveyance by Mrs. Hitz of a lot and house, a part of her separate property on Pennsylvania avenue, called the New York Restaurant, and of the value of about $15,000, and a previous conveyance of her dower interest in a large quantity of real estate conveyed by her husband to secure creditors.

This case may fairly be brought within the principles of *Prevost* vs. *Wilson*, (103 U. S., 22.)

Contingent right of dower is a valuable consideration. (*Sykes* vs. *Chadwick*, 18 Wall., 141.) and the separate estate of the wife is also. (Bump on Fraud. Con., 308 to 312.)

This deed is good as against creditors. It was made and delivered for an adequate consideration before the suit was instituted by these complainants, also before the debt was due to the complainant. Mrs. Hitz was notoriously in posses-

sion of all the property mentioned in the deed at the time of its date. No lien at law or in equity had attached in any way to the alleged interest of the husband. Therefore, the complainant has no rights as to the property. (*Van Duzer* vs. *Van Duzer*, 6 Paige, 366; *Sackett* vs. *Giles*, 3. Barb. Ch., 204; Robenitt's Appeal, 12 Casey, 188; *Long* vs. *Brown*, 13 B. Munro, 296; *Kennedy* vs. *Noble*, 5 John. Ch., 479; *Athey* vs. *Knolles*, 6 B. Mon., 29; *Gorhill* vs. *Strong*, 3 Paige, 440; *Sykes* vs. *Chadwick*, 18 Wall., 141; *Bradford* vs. *Goldsborough*, 15 Ala., 311; *Wilson* vs. *Shepherd*, 28 Ala., 623; *Beemon* vs. *Cowser*, 22 Ark., 429; *Lady Arundel* vs. *Phipps*, 10 Vesey, 130; *Chapman* vs. *Emery*, 1 Cowp., 280; *Tarlor* vs. *Heriot*, 4 Desaussure, 227; *Bullard* vs. *Briggs*, 7 Pick., 538; 1 John., 361; Atherly on Mar. Set., 163; *Park* vs. *Brown*, 26. How. Pr., 350; *Wiley* vs. *Brown*, 36 Miss., 510; Bump on Fraudulent Con., 317; *Sumner* vs. *Hicks*, 2 Black, 532; *Harvey* vs. *Alexander*, 1 Randolph, 219.)

The husband may allow his wife to retain her separate personal property, and if he borrowed her money, or used it for his own purposes, there was a valid consideration in equity to repay it. A promise to repay money so borrowed or appropriated by the husband cannot be regarded as *nudum practum*. (*Woodworth* vs. *Sweet*, 51 N. Y., 9 and cases there cited; *Syracuse Co.* vs. *Wing*, 85 N. Y., 421.) In the case last cited, Wing received $1,366 from the guardian of his wife in 1844, money inherited by her from her father's estate. Married woman's act of New York became a law in 1848. This money was relied upon for the consideration to uphold as against creditors a mortgage made in 1878. The testimony showed that the husband and wife subsequently had conversations in reference to this money to the effect that "the money was her's and that she should have it." The court sustained the mortgage and said, "if the money was received by the husband as his wife's, or to be accounted

for or secured to her, *he waiving his marital rights thereto*, she had an equitable right to the fund, sufficient to sustain the mortgage, which he subsequently gave to secure it, and the mere lapse of time would not invalidate the surety. (Citing 51 N. Y., 9 and 395; 24 N. Y., 623; 51 N. Y., 626; 1 Bishop on M. W., sec. 119.) The Supreme Court of Michigan recently placed a wife in the attitude of a creditor whose husband had used her money to buy real estate, the title to which he took in his own name, and upheld a conveyance as against creditors, made by the husband for her repayment. (*Hyde* vs. *Powell*, 47 Mich., 156.)

In the opinion of the court below, much weight is given to the fact that the trust deed to Metzerott and Cross purports on its face to be for the consideration of $1.00, and that proof offered to show that the real consideration was the conveyance of real property And that court held that such evidence was inadmissible. The evidence to sustain a deed of this character was admissible. (*Shirras* vs. *Craig* 7, Cr., 51; Bump on Fraud, Con., 557-8-9; Rowle on Cov., 66 and note; *Ballard* vs. *Briggs*, 7 Pick., 553; *Sykes* vs. *Chadwick*, 18 Wall., 141.)

This judgment was not a lien upon the property. The title was in Michael Shanks, and whatever may have been the rights of John Hitz in the property by virtue of his marital relations, it was not such an interest as could support a *judgment lien* under the statute laws of this District. His interest, if any, was a chattel interest out of possession, and until an execution *had been issued and levied upon his interest*, no lien could be created. (*Tayloe* vs. *Thompson*, 5 Peters, 365; *Bank* vs. *Morsell*, Q. U. S., 357; *Smith* vs. *McCunn*, 24 How., 398; Alex. Rev. Statutes, 716, act Geo. II, ch. 5; *Williams* vs. *Downing*, 18 Rev. St., 60; *Dalyell* vs. *Lynch* 4 W. & S., 255; Freeman on Judg'ts, § 208; *Carlos* vs. *Ansley*, 8 Ala., 900.) But if the judgment *did*

constitute a *lien*, then there was surely a full adequte remedy at law, and an equity court had no jurisdiction.

The fact that this judgment was rendered prior to the recording of the deed can avail the complainant nothing; the deed was executed, acknowledged, and delivered before the suit at law was instituted, and before any execution was issued or any attempt was made to obtain a specific lien, it was recorded. In any event, the deed to Mrs. Hitz would prevail against a judgment creditor. Judgment creditors as against the deed of Mrs. Hitz could stand in no better attitude than any of the general creditors of the husband. The rights of judgment creditors are subordinate to all the equities existing in reference to the land.

In *Finch* vs. *The Earl of Winchelsea*, (1 Peere Williams, 282), Lord Ch. Justice Cowper said:

> "Articles made for a valuable consideration and the money paid, will, in equity, bind the estate and prevail against any judgment creditor *mesne* between the articles and the conveyance; but this must be where the consideration paid is somewhat adequate to the thing purchased, for if the money paid is but a small sum in respect to the value of the land, this shall not prevail over a *mesne* judgment creditor." (See 4 Kent., 196–7.)

In the matter of Howe, (1 Paige, Ch., 125,) Walworth, Chancellor, said:

> "It is a well-settled rule of equity that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons, and that they cannot avail themselves of the legal estate thus acquired to defeat a prior equity, of which they had no notice at the time of the assignment. They differ in this respect from *bona fide* purchasers of the legal estate, and from mortgagees who have advanced their money on the credit of the land, and who are considered *quasi bona fide* purchasers. * * * A prior contract for a mortgage is entitled to preference over an actual conveyance to trustees for the benefit of

> creditors (Sir Simon Stewart's case); the case might be different where creditors, without notice of this prior equity, had released their debts in consideration of an assignment made to trustees for their benefit. * * * The judgment creditors are in no better situation than the general creditors in relation to this fund. Their judgments were not specific liens on the lands to which the equity attached. They were general liens on all the estate of the judgment debtor; but as such they cannot prevail against the prior equity of the petitioner. * * * It is a well-settled principle that the courts of equity constantly control the effect of judgments subsequent to a contract for the sale of the estate.

In equity a contract of sale of land is not merely executory, but the vendee becomes the owner, and the vendor is seized in trust for him, which trust attaches to the land and binds all who claim under him with notice. (1 Hilliard on Vendors, 4, sec. 13; see, also, *Howey* vs. *Alexander*, 1 Randolph, 219; *Quarles* vs. *Lorey*, 2 Munford, 251; *Taylor* vs. *Moore*, 2 Randolph, 563; *Smith* vs. *McCunn*, 24 How, 398; 13 How., 287; *Housten* vs. *Newland*, 7 Gill & J.. 463; *Matthews* vs. *Ward*, 10 G. & J., 442; *Hopping* vs. *Beecher*, 2 Green, (Iowa), 46; *Wilkes* vs. *Harper*, 2 Barb., Ch. R. 338.)

There is another important feature in this case, and that is the dower interest of the widow of Michael Shanks; she survived until January, 1879. This dower estate was of higher dignity than was that of *curtesy initiate*. Therefore, as to the undivided one-third of the estate, the husband's marital rights never became operative, because the widow survived until after the act of April 10, 1869. (*Shore* vs. *Corley*, 8 Allen, 426; Cooley's Con. Lim., 361; *Baker* vs. *Flourney*, 58 Ala., 650; *Price* vs. *Sessions*, 3 How., 624.)

It is submitted that this is an attempt on the part of this bank which ought not to be regarded with favor by any

court, be it law or equity. To protect married women and children from being despoiled of their property is one of the favorite powers of a court of equity, and laws made for their protection ought to be most liberally interpreted. The claim made here is based upon one of the wicked rules of the common law, which were incidents of a warlike and semi-civilized age. Our legislative power, in 1869, declared it should be abolished, in as plain language as could be found; and now a creditor of a husband cries out that the husband's "vested" estate and constitutional rights have been violated, when the husband himself denies it. It should not be forgotten that this creditor has a complete remedy against the other makers of the note, who are amply able to pay.

III.

This cause was not heard in the Special Term. On the 9th of September, 1880, the testimony being closed, the Special Term ordered that the cause be heard in the General Term in the first instance. (93.) Thereupon, and while the cause was then pending and undecided, and on the 11th day of April, 1881, Jane C. Hitz, the present appellant, exhibits to the said court her petition, duly sworn to, setting forth, among other things, that the defendant, John Hitz, the judgment debtor at law, was, from the 23d day of September, 1864, and up to the time of the filing of the petition, and then was the duly accredited "consul-general" of the Swiss Confederation, or of the Republic of Switzerland, in the United States, and was received and recognized as such for the States of Virginia, Maryland, and Delaware, and for the District of Columbia, and that from the 28th day of February, 1868, he had been, and still was, the "agent politique" or "political agent" of the said Swiss Confederation, duly accredited to the United States, and received and recognized as such, and that within the mean-

ing and provision of the second section of the third article of the Constitution of the United States he was a "public minister" of a foreign power, and that at the date when the said debt accrued, and when the said action at law was instituted, and when said judgment at law was rendered against him, as well as when the bill in this cause was exhibited, the said John Hitz was such "public minister," and that the said Supreme Court of the District of Columbia was wholly without jurisdiction to entertain any suit against said John Hitz, either at law or otherwise, and that said judgment at law is, and was, null and void.

The petition further alleged that said John Hitz was born in Switzerland, and was at the time of said actions at law, and still was a citizen of the Swiss Confederation. The petition prayed that the said judgment at law might be declared null and void and that the bill might be dismissed.

No answer to or denial of the truth of the averments of this petition was filed, but on the 13th day of April, 1881, the decree appealed from was passed and entered by the court, notwithstanding the facts set forth in the petition. (101.) This was error.

1. The court below had not jurisdiction at the dates mentioned, either to issue a writ, or entertain a suit, or to render a valid judgment against John Hitz, because he was a public minister, representing a foreign power, duly accredited to, and received and recognized as such by the United States.

2. John Hitz was an alien, and therefore could not become a tenant by the curtesy either *initiate* or *consummate*, and the court should, in equity, have inquired of this matter.

The objection of want of jurisdiction may be brought to the attention of the court in any way and at any time, and the court will stop. (*U. S.* vs. *New Bedford Bridge*, 1 W. & M., 401; *Jackson* vs. *Ashton*, 8 Peters, 149.)

Hitz, at the time when the debt was contracted, and at the time when each of these proceedings was instituted in the court below, was "Consul General" and also "Agent Politique" of the Swiss Confederation in the United States, and it is contended in behalf of the appellant that in either capacity he was completely protected from actions at law and suits in the Supreme Court of the District of Columbia by the Constitution and laws of the United States.

The Constitution of the United States, Article III, Section 2, provides as follows:

> "In all cases affecting ambassadors, other *public ministers and consuls*, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction."

This provision gives to this court *exclusive* jurisdiction over both "consuls" and "public ministers."

No argument is deemed necessary as to "consuls," because the higher office of "public minister" will dispose of the question in this case, but, for convenience, the written laws relating to "consuls" will be noted here.

The statute on this subject is in the following words:

> "And it (the Supreme Court) shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have, consistently with the law of nations, and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party." (1 Stat., 80; R. S., sec. 687.)

There is also a provision in the treaty of 1850 (11 Stat., 591,) with the Swiss Republic, which provides that, "In their private and business transactions consuls and vice-consuls shall be submitted to the *same laws and usages as*

private individuals, citizens of the place in which they reside."

In reference to this provision of the treaty it is suggested that if, as we contend, this court, by the terms of the Constitution, is clothed with *exclusive* jurisdiction on this subject, it is in the power of the political branch of the Government neither to deprive it of such jurisdiction nor to modify or divide that jurisdiction.

The averments of the petition of the appellant, not having been traversed, must be taken as true, and it is, therefore, for the purpose of this discussion, to be considered as a fact that the defendant, John Hitz, at the time the debt was contracted, when he was sued, and when the judgment at law was entered against him, was the "*Agent Politique de la Confederation Suisse pres le Gouvernement des Etats-Unis d'Amerique*," or the "Political Agent of the Swiss Confederation near the Government of the United States of America."

The question then arises, what is an "*Agent Politique*" or a "Political Agent," in the language of the letter of credence issued to Hitz by his Government; and is such an officer a "foreign minister" within the meaning of the Constitution of the United States?

I am indebted to the politeness, learning and ability of a distinguished member of our bar (R. D. Mussey, Esq.,) for the following argument, which I have copied, with only such alterations as enabled me to adapt it to this brief, from his pamphlet entitled "A Study in International Law," (1882):

* * * * *

"Political agent" is not, to any one who has a sense to the niceties of languages, a precise equivalent of "agent politique." Translations, at their best, are but renderings. They are not absolute and entire transfers. Something is left behind. Particularly is this so of titles and technical terms. *Chargé d'Affaires* is always suffered to remain in

the original. Everybody who needs to use the phrase knows what it means. No one thinks of turning it and its precise description into English or any other tongue. And in the history of diplomatic intercourse there has attached to this term *agent politique* a significance which is not promptly, and upon the instant, suggested to one whose American ear has come to associate *political* with the contests for public position, which quadrennially, and oftener, vex the Republic. In the original *politique* has reference to those higher functions of government and public economy, which in its Greek origin the word bore, and which we preserve in the word *politic* when we speak of the "*body politic*."

It would have been a closer and more accurate version of the real intent had this phrase—*Agent Politique de la Confederation Suisse*—been translated "Agent of the Body Politic of the Swiss Confederation."

Even then it would not have given all the meaning of the word, for, as will be seen further on, it signifies also, and at the same time it has the significance just stated, the agent as to political (or State) affairs.

* * * * *

Agent Politique and *Agent Diplomatique* are used by authors in the language to which these terms are native as interchangeable and synonymous. And it is fundamental that in construing a foreign technical term, as in construing a foreign statute, that construction shall obtain which has been given in the country of its origin.

That these terms, *Agent politique* and *Agent Diplomatique* are so used, it would perhaps be sufficient to refer to the *Dictionary of the French Academy*, which [*sub verbo* AGENT] after defining *Agent* as one who does the work of others, who is charged with a function, a commission, by a government or a board of management (*administration*) in one or more particulars, names various classes, or kinds of Agents, among them *Agents Politiques ou Diplomatiques.*

MOREUIL in the Introduction to his *Manuel des Agents Consulaires* (*Paris*, 1853,) in discussing the immunities and privileges of consuls, uses the term *agents politiques* as synonymous with *public ministers.*

Again, in *Part 3d* of the same work, *Title* 1, he says:

> We will now proceed to treat briefly in the three paragraphs that follow of the jurisprudence relating—1st, to diplomatic agents in general—2d, to consuls in general—3d, the law of nations as to diplomatic agents.
>
> That which leads us to give a paragraph to diplomatic agents and another, as a consequence, to the law of nations to which they are specially related, is, that with us, the question of ascertaining whether consuls should be considered as *public ministers* and consequently as *agents politiques* admits, &c.

So, too, the same author cites *Miltitz's Manuel des Consuls* as authority for the statement that the Vidame of Venice at Aquileia was the only Consul who had been formally designated as *ministro publico*—and MILTITZ translates the Italian term into the French *agent politique*. (*Op. cit.* Introduction, p. xxii.)

A similar use of the term in question as implying the possession of those functions which are lodged in those who in our American nomenclature are known as Diplomatic Agents—will be found in the *Guide Pratique des Consulats* by DE CLERCQ and DE VALLAT, published under the auspices of the Minister of Foreign Affairs at *Paris*, 1858,(2d Edition,) Vol 1. pp. 4, 41, 170, *et al.*

In *Traite Complet De Diplomatie par un Ancien Ministre* (Count DE GARDEN) Paris, 1833, Vol. 1, p. 3, occurs this passage:

> In the limited sense of the law of Nations the title Minister or Foreign Minister is applied to a public functionary sent to negotiate in the name of a State with another State. Under the designation of Embassy or Legation are comprehended all the rights which belong to the nation, relating to negotiations by those *Agents Politiques* to whom are given the different qualifications of Ambassadors, Envoys, Ministers and Charges des d'Affairs.

So too BESCHERELLE'S Dictionary defines *Agent Diplomatique* thus:

> A functionary accredited to a Government by a Foreign Power [charged] with the mission of occupying himself with the *relations politiques* which exist be-

tween the two countries and specially of looking out for the interests of the State of which he is the mandatory.

If space permitted many more instances could be cited that *Agent Politique* implies the possession by him who bears the title, and has the office, of those functions in relation to the "*Body Politic*" which accredits him, in respect of the intercourse between foreign nations by common consent attributed to, and understood to be possessed by, *Agents Diplomatiques*. One must suffice. It is one indeed which may be called conclusive and one on which the contention here made could have been safely rested, had it not been desired to show that though a technical term, it is one which has a well ascertained and definite meaning, recognized by Lexicographers as well as Text-Writers. The *Dictionaire, ou Manuel-Lexique Du Diplomate et Du Consul*, by DE CUSSY, is accepted authority as being the best, if not the only Dictionary of Diplomatic Terms. Under the words *Agents Politiques*, this work says:

> *Agents politiques* represent more or less fully their sovereign; custom constant and invariable drawn from the very nature of their functions has impressed on them a sacred character, and given them distinction and immunities. The chief attribute of an *Agent politique is inviolability*; this is a consequence of the nation he is representing, and of the *extra-territoriality* which the public minister enjoys—freedom, that is to say from the sovereignty and control of the country where he resides *Inviolability* is a *sine qua non* of his admission. Every act which attacks it is a wrong. Inviolability and extra-territoriality entail exemption from local jurisdiction.

A discussion of the extent and character of this exemption follows, in which the author adopts (or cites) the views of KLUBER and others. This discussion it is not necessary to reproduce or follow. For, our own law and custom define such exemption, when once its possession is conceded.

These citations establish beyond contradiction the meaning of the term *agent politique* and the character of the functions of such Agent. Indeed, if we may trust the ety-

mology of FLASSAN (cited approvingly by MARTENS) who says:

> —Diplomacy is the title which has been known for a certain number of years the science of foreign relations that has for its foundation *diplomas* or written documents emanating from sovereigns—

the *Agent politique* is more ancient than the *Agent diplomatique*. For the political agent preceded the diploma that he received. It is as we say "the utterances of the Bench" rather than the utterances of the Judge that sits upon it, that "diplomatic agent" has supplanted the older form, "political agent." The instruments that accredited them have named the negotiators.

That a "political agent," or an *agent politique*, as the letter of credence states it, should be unknown to our American Diplomatic terminology, as a distinct grade of Diplomat—if such were the case—argues nothing against the Diplomatic character of the person bearing the title, "and in due form accredited" and recognized as such."

The Sovereign may give any name he chooses to the agent whom he sends abroad on State affairs. It is true that modern Diplomacy has, generally, acquiesced in the gradations made by the Treaty of Vienna of 1815, and that nations have, in their intercourse with other nations, adopted them. But these grades, after all, are chiefly for matters of ceremony and rank, and neither Switzerland nor the United States was a party to the Congress that promulgated them.

* * * * * * *

WICQUEFORT, in his treatise on *The Ambassador and His Functions*, says, (London edition of 1716, p. 3):

> All other Ministers, as Plenipotentiaries, (if they have with this Quality the representing character (Internuncios, Envoys, Residents, *Agents*, Commissioners, the Secretaries of Embassies, and even the Secretaries of Embassadors, who, in the absence of their Masters, or during the Intervals of Embasses, are charg'd with the Prosecution of Solicitation of Affairs, are also *Publick Ministers*, and as such they enjoy the protection of the *Law of Nations* in its full extent. This obliges me to speak of 'em as occasion requires, and to show that notwith-

> standing they are not paid the same Civilities that are inseparable from their Character, yet there is no hindrance to their enjoying all the same Advantages which the Law of Nations and the Publick Faith bestows on all those to whom one may give the Quality of *Legatus*.

Again—(on pp. 38, 39.)

> An Agent is not, properly speaking, a Publick Minister, and yet it is one hundred and fifty years since no other Minister was know after an Embassador that the Agent.

That is, the word *Agent* has fallen into desuetude. It is archaic—that's all. And though you may criticise the style of a man or a government that uses an archaic word, you can't deny, because his or its style is not yours, a meaning to his or its utterance.

In the memorable *Declaration of the Estates of Holland and Westfrise*, (March 29, 1651,) which formulated into law the privileges and immunities of Public Ministers, the classes protected are:

> Embassadors, Residents, *Agents* or *other Ministers*, of Kings, Princes, Republics or others, having the Quality of Publick Ministers.

The *Encyclopædia Brittanica*, (edition of 1855, vol. 1, p. 236) says:

> In Diplomacy a class of semi-Ambassadors, termed *Agents* have been employed generally between States of unequal power. The small community might send an Agent to propitiate some powerful government and secure its protection. A great power would, on the other hand, distribute its Agents among the petty States which it kept in clientage to see that no contracting influence was at work among them. In this shape our Indian Government keeps agencies in the protected and neighboring States. In countries within the operation of the laws of diplomacy, an Agent has the privilege of personal protection, and sometimes that of exemption from direct taxes, but he has not the am-

bassador's prerogative of communicating directly with the sovereign.

* * * * *

The very earliest Diplomatic Agent of the United States —so early, indeed, that he was sent by the Colonial Congress in March, 1776—SILAS DEANE, bore a letter of credence to the French Minister of Foreign Affairs, accrediting him as the POLITICAL AND COMMERCIAL AGENT of the nascent Republic. That the sacredness of his diplomatic character was recognized by the French Government, though his outward guise was that of a merchant, is evident from his letter to the "Committee of Secret Correspondence," under date of August 18, 1776.

> To which he (the Count de VERGERNES replied * * * * * * that I was under his immediate protection, and should I meet with any difficulty, *either from their police*, with the rules of which he supposed me to be unacquainted, *or from any other quarter*, I had but to apply to him and everything should be settled.

Thus the "Political Agent" of the Colonies was enabled by the free exercise of his Diplomatic functions to pave the way for that recognition of American Independence, which the "Commissioners" of the United States—FRANKLIN DEANE and LEE, subsequently procured.

The statutory definition of the term "Diplomatic Officer" given by Section 1674 of the Revised Statutes of the U. S., [2d Edition] expressly includes *Agents*.

In so including them it puts itself in accord with the dictates of sound reason and the authority of writers on International Law.

VATTEL says (*Book* IV., *Chap.* VI., § 75):

> Formerly *agents* were a kind of public ministers; but in the present increase and profusion of titles, this is given to mere commissioners appointed by princes for their private affairs, and who not unfrequently are subjects of the country where they reside. *They* are not public ministers, and consequently not under the protection of the law of nations. But a more particular protection is due to them than to other foreigners or

citizens, and some regard in consideration of the prince whom they serve. *If this prince sends an agent with credentials, and for public affairs, the agent from that time becomes a public minister; the title makes no alteration.* This is likewise applicable to deputies, commissaries and others charged with public affairs.

Mr. HITZ was an Agent appointed by his Sovereign—the Swiss Confederation—on public affairs, as exprssed by the word *politique;* and with credentials—his letter of credence. See Letter of Credence (98.)

* * * * *

That is the letter of a Government speaking through its representative head to another Government and appointing an Agent—not for private business—but an Agent of the State clad with, and charged with, the functions of the State.

It confers by its terms "representative" character. It bespeaks for him in such character "faith and credence" in all that he shall say in the name of his Government.

It is not a letter of recommendation—asking favors and good offices. It is the letter of Attorney from the Swiss Government constituting its bearer the representative and organ of that Government.

Extracts from the report of its administration made by the "Political Department," presented to the Federal Council of Switzerland, March 26, and adopted by it April 25, 1874.

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* * * * * *

I. DIPLOMATIC AND CONSULAR REPRESENTATIVE OF SWITZERLAND ABROAD,

"A. LEGATIONS.

This is a statement of the *personel* of the Foreign Legations of the Swiss Confederation, December 31, 1873.

PARIS.—*Dr. Kern*, of Berlingen, (Thurgovie), Envoy Extraordinary and Minister Plenipotentiary.

* * * * * *

ROME.—J. B. Pioda, of Locarno, Enuoy Extraordinary and Minister Plenipotentiary.

* * * * * *

VIENNA.—Mr. de Tschudi, of Glaris, Envoy Extraordinary and Minister Plenipotentiary.

* * * * * *

BERLIN.—Mr. B. Hammer, of Olten, Envoy Extraordinary and Minister Plenipotentiary.

* * * * * *

WASHINGTON.—Mr. J. Hitz, Consul-General and Diplomatic Agent.

Up to this time we have not carried out the orders of the Federal Assembly of July 22 and 24, 1869, asking the Council to submit to it a report, and suggestions on the question whether, and how, it would be necessary to organize the Diplomatic representation of the Confederation by means of legislation. We have preferred to await, as we said in our last report of our administration, an ascertainment of the result of the revision of the Federal Constitution. We hope this question will soon receive its solution and that then we shall be able to occupy ourselves with the project of a law."

This view of the dignity of the office of a "Political Agent," is strengthened by a passage in the message of the President of the United States to Congress, dated December 4, 1883. The President referring to the *diplomatic* relations of the United States with Bulgaria, uses this language:

> "Under the Treaty of Berlin, liberty of conscience and civil rights are assured to all strangers in Bulgaria. As the United States have no distinct conventional relations with that country, and are not a party to the treaty, they should, in my opinion, maintain *diplomatic* representation at Sofia for the improvement of intercourse, and the proper protection of the many American citizens who resort to that country as missionaries and teachers. I suggest that I be given authority to establish an AGENCY and CONSULATE-GENERAL at the Bulgarian capitol."

The distinction between the *diplomatic* and the *consular* relation is distinctly marked here. (See Message, Dec. 4, 1883, p. 3.)

The term "political agent" is used by the following writers as denoting a person clothed with diplomatic powers and privileges:

Moreuil, "Manuel des Agents Consulaires;"
De Cussy, "Manuel Lexique de Diplomates;"
De Garden, "Traite complet de Diplomatie."

These authorities should seem to establish beyond controversy, that John Hitz, by virtue of his appointment and recognition as "Political Agent," became and was a "public minister," within the meaning of the clause of the constitution above cited.

It is sufficient for me to submit a list of the authorities bearing upon this important constitutional question. All that I have been able to find are given, whether they be for or against the exclusive jurisdiction. (*U. S.* vs. *Ravara*, 2 Dall., 297; *U. S.* vs. *Ortega*, 11 Wheaton, 467; *Davis* vs. *Packard*, 7 Pet., 276; *Casey, Receiver*, vs. *Galli*, 94 U. S., 673; *State* vs. *De la Font*, 2 Nott & McCord, 217; *St. Luke's Hospital* vs. *Barclay*, 3 Blatch., 259; *Graham* vs. *Stucken*, 4 Blatchf., 50; *Gittings* vs. *Crawford*, Taney's Dec., 1; *Marbury* vs. *Madison*, 1 Cr., 137; *Cohen* vs. *Va.*, 6 Wheat., 378; *Boull* vs. Osborn, 9 Wheat., 820; *Com'th* vs. *Korsloff*, 5 S. & R., 545; *State of Georgia* vs. *Brailsford*, 2 Dall., 402; *Gale* vs. *Babcock*, 4 Wash., C. C., 199; *State* vs. *University* 5 Nat'l B. Reg., 466; *State of Wis.* vs. *Duluth*, 5 Dill, 406.)

The decree of the Supreme Court of the District of Columbia should be reversed with directions to dismiss the bill.

ENOCH TOTTEN,
For Appellant.

111-722

In the Supreme Court of the United States.

October Term, 1883.

JANE C. HITZ,
Appellant,

vs.

THE NATIONAL METROPOLITAN BANK,
Appellee.

No. 254.

Supplemental Brief for Appellant.

This supplemental brief gives additional authorities as applicable to the various points made in oral argument in behalf of the appellant.

First. The rights of the husband in the property of the wife are created and regulated by law and not by contract, and may at any time be enlarged, diminished or wholly abolished by the legislative power. The same doctrine applies to dower.

Lucas vs. *Sawyer*, 17 Iowa, 517;
Milizit's Appeal, 17 Pa. St., 449;
Moninger vs. *Ritner*, 17 Reporter, 284, No. of Feb'y 27, '84;
Miller vs. *Miller*, 16 Mass., 59;
Holbrook vs. *Finney*, 4 Mass., 566;
Moore vs. *City*, 8 N. Y., 110;
Weson vs. *Gregg*, 6 Ohio St., 547;
Barbour vs. *Barbour*, 46 Me., 9;
Noel vs. *Ewing*, 9 Ind., 37.

In *Noel* vs. *Ewing*, will be found an elaborate criticism of the case of *Westervelt* vs. *Grigg*, (12 N. Y. 212) resulting in the repudiation of the doctrines of the latter case.

Second. The interest of the husband in his wife's property may certainly be abolished by the legislative authorities *with his consent.* Chief Justice GIBSON in *Lefever* vs. *Witmer*, (10 Barr, 505,) uses the following language:

> "It may be that the legislature has not constitutional power to divert a husband's freehold in his wife's inheritance without his consent; but it has certainly power to divest it *with his consent*, so as to free it from his creditors who have not obtained a lien on it."

[See answer of defendant Hitz, p. 14, and his deposition, pp. 45, 46 and 49.]

Third. A court of equity will not compel a husband to assert his rights to his wife's property, arising out of his marital relations, for the benefit of creditors.

Bonslaugh vs. *Bonslaugh*, 17 S. & R., 361;
Starrett vs. *Wynne*, Ibid., 130;
Manns, Ex. vs. *Higgins*, 7 Gill., 265.

Fourth. Even if the marital rights of a husband in his wife's property cannot be diminished or destroyed as to creditors existing at the date of the act, or as to those whose claims were then in suit, the subsequent creditors cannot complain, and the statute protects the interest as against them.

Cunningham vs. *Gray*, 20 Mo., 171;

Bronslaugh vs. *Bronslaugh*, 17 S. & R., 361;
Graham vs. *R. R. Co.*, 102 U. S., 148;
Sturgis vs. *Crowninshield*, 4 Wheaton, 122.

Fifth. Even if the act of April 10, 1869, did not abolish the marital relation of the husband to the property in question, it *exempts* his interest, whatever it was, from the claims of subsequent creditors. The act provides, amongst other things, that the right of any married woman to any property, by her "acquired during marriage," * * shall be as "absolute as if she were unmarried," and that it shall not "be liable for his debts."

This is clearly an *exemption* law, and such laws have always been held to be good and effectual, so far as subsequent creditors are concerned. The statute deals with the *right* of all married women in and to their property, and makes the right *as absolute* as if she were *unmarried.*

Sturgis vs. *Crowninshield*, 4 Wheat., 122;
Cooley's Con. Lim., 278;
2d Bishop Rights of M. W., §§ 34, 35.

Sixth. Such a law is for the benefit of both husband and wife, and is also for the benefit of society and the estate. So far as subsequent creditors are concerned, it does not impair the obligations of any contract, nor does it take away any "vested" right. The husband does not complain.

Miller vs. *Miller*, 16 Mass., 59;
Lucas vs. *Sawyer*, 17 Iowa 517.

Seventh. The consideration actually paid for property may be shown by parol, in a case where the consideration expressed in the deed is "one dollar," and more especially should this be so, where the bill prays a disclosure of the "real and true consideration."

Harvey vs. *Alexander*, 1 Ran., 219;
Ballord vs. *Briggs*, 7 Pick., 533.

Whilst the personal property belonging to the wife and by the husband lost by mismanagement or otherwise, may not constitute a *valuable* consideration for such a deed, yet it does constitute a *meritorious* consideration.

Harvey vs. *Alexander*, 1 Ran., 219;
Hyde vs. *Powell*, 47 Mich., 156.

Eighth. The reasonable expectation of life of John Hitz, is not averred in the bill, nor was there any proof whatever offered on this subject. The reasonable expectation of the duration of the life of the owner of the life estate in such cases, is a most important matter, and it must be established by proof as any other material fact, and so also as to the *value* of such life estate in reference to the property.

The burthen of proof being upon the complainant to show that the deed was "voluntary" as is alleged, and there being neither averment nor proof of the value of Hitz's, alleged "life estate," the court is bound to presume that the life estate was and is of no value.

Shippens Appeal, 80 Pa. St., 391.

Ninth. The fraudulent character of the deed must be fully established as to all the parties, otherwise the deed will be upheld. There was no fraud on the

part of Mrs. Hitz. (See p. 66.) Hitz then thought he was able to pay the debts he really owed (52), and was very desirous of paying all his debts. (Sec. recital in deed of trust to Keyser,, and deed of Mrs. H. for the "New York House," 25.)

Hyde vs. *Powell*, 47 Mich., 156 ;
Provost vs. *Wilson*, 102 U. S., 22.

Tenth. The case of *Magdalena Steam Navigation Co.* vs. *Martin* (2 Ellis and Ellis, 94), completely overrules the case of *Taylor & Best*, cited by counsel for appellee, and pronounces the doctrine of the latter case unsupported by authority. The report of this case contains an instructive review of the Text Books on the subject of the rights and privileges of public ministers. In the opinion of the court is found this passage, which is closely appropriate to the case at bar :

> "Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by showing that he is not liable to be sued."

In the case at bar the bank would have had its money before this, had it proceeded against the other parties to the note; as it might have done under the law of this District without joining Hitz or even explaining his omission.

That there can be given to a consul diplomatic functions by appropriate appointment and recognition, and that he will then be treated as a diplomatic of-

ficer by the courts, see *The Anne*, 3d Wheaton, 435, (446.)

While the certificate of the Secretary of State is *conclusive* evidence of the character of a public minister, parol evidence is admissible to show the period where such person was considered by the Government of the United States as a minister.

The U. S. vs. *Liddle*, 2 Wash., 205.

In the present case an undisputed averment is made that Mr. Hitz was, when the judgment was rendered, and when the petition of Mrs. Hitz was filed in the present case, a public minister, which averments are supported by sworn copies of his letter of credence and the letter of recognition. If there had been any doubt of the truth of the allegations, opportunity to traverse them and take "parol proof" and bring into court the originals, should have been given.

That the want of jurisdiction here set up may be taken advantage of by motion or suggestion, see—

Schooner Exchange vs. *McFaddon*, 7 Cranch, 116;

Col. Pit's Case, Comyns Rep., 444;

Lyell vs. *Goodwin*, 4 McLean, 29.

The fact that a court is without jurisdiction to hear and determine a cause may be brought to its attention at any time and at any stage of the proceeding, and no further steps will be taken until that question shall have been determined. On this subject this court declared the law to be as follows:

"However late this objection has been made,

or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extrajudicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.

ENOCH TOTTEN,
For Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 254.

JANE C. HITZ,
Appellant,

vs.

THE NATIONAL METROPOLITAN BANK.

Appellee's Brief.

R. K. ELLIOT,
LEIGH ROBINSON,
Of Counsel.

R. O. POLKINHORN, PRINTER, 632 and 634 D Street.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 54

JANE C. HITZ,
Appellant,

vs.

THE NATIONAL METROPOLITAN BANK.

Appellee's Brief.

The bill avers that the complainant corporation, on April 28th, 1879, obtained a judgment against the defendant John Hitz for $10,000, with interest from October, 1878; that on June 8th, 1879, a writ of *fieri facias* was issued on the judgment, and returned on the same day by the marshal *nulla-bona;* that on the next day another execution was issued upon the judgment and levied by the marshal on the estate and interest of John Hitz in the lands referred to in the bill, whereof the defendant Jane C. Hitz, his wife, became seized during coverture; that the said defendants have lawful issue capable of inheriting the same, and that the estate of John Hitz therein is subject to execution at law.

By deed purporting to have been executed on Dec. 9th, 1878, *but which was not recorded until May 13th, 1879,* the

said defendants "for and in consideration of the sum of one dollar," conveyed their interest in the said lands to W. G. Metzerott and Samuel Cross, in trust for the sole, separate and exclusive use of the said Jane C. Hitz, for and during the term of her natural life, and for other uses therein specified. The bill avers that this deed was recorded, on the day above mentioned in violation of an express condition and agreement that it should not be, and there is filed with the bill as an exhibit, a copy of an instrument in writing executed by Metzerott and Cross, recorded on May, 26th 1879, stating the foregoing facts, and declaring that they had not accepted the trusts contained in the said deed, (Rec., p. 27). The complainant charges that this deed is fraudulent and void as against the complainant, and ought to be removed out of the way in order that the complainant, by a sale under execution, may obtain a full price for the estate and interest of said John Hitz in the premises so levied on, (Rec., p. 2, *et. seq.*) The answer of the defendant Metzerott substantially admits the averments of the bill as to the trustee.

The answer of Mrs. Hitz states that she was married to John Hitz August 5th, 1856; that they have two children, that she is "the daughter and sole heir-at-law of Michael Shanks," who departed this life, intestate, May 20th, 1864, leaving the respondent, his daughter, and Catherine N. Shanks, his widow; that the latter died Jan. 26, 1879; that the real property mentioned in the bill was part of the realty owned by the said Michael Shanks at the time of his death; that at the time of his death, said Shanks was the owner of a large fortune in realty and personalty; that the personalty has in great part been wasted by her husband; that upon discovering this fact about Nov. 1st, 1878, she assumed exclusive control over all her property, and that her husband relinquished all control over it. She adds, that to remedy the wrongs worked by the mismanagement of her property,

the deed of trust aforesaid was made, acknowledged, delivered and recorded. She denied that the said deed was voluntary and without consideration; denies that her husband has any interest in said lands which can be taken in execution, and denies the charges as to the circumstances connected with the delivery of the deed to Metzerott, (*Id.*, p. 7, *et. seq.*)

The answer of John Hitz, in substance, reiterates these defences, (*Id.* p. 14.) The testimony of Mr. and Mrs. Hitz fails to show that the consideration for the execution of the deed of trust aforesaid, was in point of fact other than that expressed in the deed. (*Id.*, 47, 48, 60.)

Their account of the circumstances and purposes for which the deed was executed is contradicted by Metzerott and Cross, and is inconsistent with the facts shown by the record. (*Id.*, 35.)

There is a distinction made in the books between tenancy by the curtesy *initiate*, or the estate which a man acquires by marriage, seizin of the wife, and issue born alive; and the estate rendered *consumate*, as it is termed, by the death of the wife. But, for every purpose of this controversy, it is a distinction without a difference, since the estate is as completely subject to execution for the husband's debts, before as after the death of the wife. Herman on Executions, p. 182; 2 Kent. 113, (p. 131; *Bennett* vs. *Child*, 19 Wis., 387; *Lancaster County Bank* vs. *Slauffer*, 10 Pa. St., 398: "The interest of a tenant by the curtesy is a vested legal estate distinct from that of the wife, and is liable to all the incidents of any other freehold or life estate; it is subject to sale under execution, or by himself, or he may lease it to the extent of the whole or any part of the term. *Shortall* vs. *Hinckly*, 31 Ill., 219; and this is true when the estate is "initiate" only. *Bank* vs. *Williams*, 17 Pick., 438; *Kirby* vs. *Tead*, 13 Met., 149.

Sixty years ago, the Supreme Court of the State of New York decided, that upon execution against the husband,

who was tenant by the curtesy initiate, a sale of his interest in the wife's real estate (the wife then living) carried to the purchaser the husband's whole life estate as tenant by the curtesy, *Shermerhorn et al.* vs. *Miller and wife*, 2 Cowen, 439; and thirty years later, in *Sleight* vs. *Read*, it is remarked, that such is now considered the settled law, "having never been questioned in this State since." 18 Barb., 161, In *Vanduzer* vs. *Vanduzer*, 6 Paige, 370, the Chancellor, said: „With the strongest desire to protect, if possible, this unfortunate wife and her helpless children, who are about to be reduced to beggary in consequence of the improper conduct of an improvident and gambling husband and father, aided and encouraged perhaps in his vicious courses, by those who are now about to take from the wife and children their only means of support, I have not been able to find any principle, either of law or equity, which can authorize this court to interfere with the husband's legal estate, as tenant by the curtesy initiate in his wife's real property, so as to place it beyond his reach, and the reach of his creditors." In *Ellsworth* vs. *Cook*, the same doctrine is affirmed, 8 id., 647: "In regard to this estate, perhaps no one question is better settled than this: that from the time of the *vesting* of the estate by marriage, seizin and the birth of issue, it becomes a right inseparable from the inheritance, that cannot be restrained, prevented, or destroyed by the act of the wife or of any other person, or by any proviso or condition." *Billings* vs. *Baker*, 28 Barb., 368. The authorities which might easily be multiplied fully vindicate the language of the court below, that "by the uniform declaration of every authorized exponent of the law from its earliest ages to the present time, it is incontestibly settled that by the common law, the husband, from the moment of his marriage, became entitled by virtue of his marital rights to an estate in the lands of inheritance of his wife, during their joint lives; that immediately upon the birth of a living child capable of inheriting

the lands, the husband became entitled to an estate in all the lands of which she might be seized at any time during the coverture for the term of his own life." *Bank* vs. *Hitz.* 1 Mackey, 115.

These principles were in force in Maryland on the 29th day of February, 1801; and no intervening acts of Congress have changed or modified their operation in this District as, in Maryland, has been done by Statute of that State, *Rice* vs. *Hoffman*, 35 Md., 349; unless, as the appellant insists, the husband was divested of this previously vested right, by an act of Congress of April 10th, 1869. This act, which is § 727 of the Revised Statutes of the District of Columbia, is as follows:

> "In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute, as if she were not married, and shall not be subject to the disposal of her husband nor be liable for his debts."

It is indispensable for the appellant to maintain that this is a retrospective statute, which operates upon the past, and deprives a party of his vested rights. But to hold this is a strained construction, which violates a general rule of jurisprudence, (reiterated as the occasion required by this Court), "that it is of the very essence of a new law, that it shall apply to future cases, and such must be its construction unless the contrary appears." *McEwen et al.* vs. *Den, Lessee*, 24 How., 244. "It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect." *Harvey* vs. *Tyler*, 2 Wall., 347. "The act of Congress passed in general terms ought to be so construed, if it may, as to be deemed a just exercise of constitutional authority; and not only so, but it ought to be con-

strued not to operate retrospectively or *ex post facto*, unless that construction is unavoidable; for even if a retrospective act is or may be constitutional, I think I may say, that according to the theory of our jurisprudence, such an interpretation is never adopted without absolute necessity." Story, *J.*, in *Blanchard* vs. *Sprague*, 2 Story, 171–2. *Id.*, 3 Sumner, 535.

It has been so held when the law upon its face might purport to be retrospective. In *Warren Manfg. Co.* vs. *Etna, &c.*, the Court says: "But the law in question, al though it purports upon its face to have a retrospective operation, cannot be considered as having such effect and operation. It is a sound general principle that no statute ought to have a retrospective effect. It is a general rule that a statute takes effect from its date, when no time is fixed, and it cannot, upon sound principles be admitted that a statute shall, by any fiction or relation, have any effect before it is actually passed. A retrospective statute partakes in its charater of the mischiefs of an *ex post facto* law, and when applied to contracts or property, would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties." (2 Paine, 517.) Substantially the same language is used by Blatchford, J., *in the matter of William Billing:* "The general rule is that a statute will not be construed as being retroactive in its operation, unless the intention that it shall be so retroactive appears on its face, and that when such intention appears, the statute will be allowed to operate retroactively, *unless some vested right will be impaired or some contract will be violated.*" 3 Benedict, 214.

Unless, then, a contrary intention is manifest, the general rule "that a statute takes effect from its date, when no time is fixed," is applied to this statute. And certainly it cannot be said that the contrary intention is manifest.

Reasonable But it should be added that this ~~presumable~~ and just view

is fortified by the interpretation which has been given similar statutes in different States of the Union.

In Pennsylvania, it was provided by an act approved April 11th, 1848, "that every species and description of property, whether consisting of real, personal, or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman as fully after marriage as before; and all such property of whatever name or kind which shall accrue to any married woman during coverture by will, descent, deed, conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property;" but the Supreme Court of this State had no difficulty in deciding that this act "was not intended to take away the vested rights of the husband, and does not allow him to give them away in fraud of his creditors."

Stubman vs. *Huber*, 21 Pa. St., 260.

In the State of Illinois there was passed on April 24th, 1861, "An Act to protect married women in their separate property," in these words:

> "That all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires, in good faith, from any person other than her husband by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwitstanding her marriage, be and remain during coverture, her sole and separate property," &c.

The language of the Court in *Rose* vs. *Sanderson* may be applied to the case at bar:

> "Can life estate, already vested in the husband, be possibly considered as coming within the description of property belonging to any married woman as her sole

> and separate property? That is to say, 'belonging' to another? This would be simply a contradiction in terms. Yet when this law was passed, the property in controversy, to wit, the life estate of the husband before marriage was as completely his as if his wife, before the marriage, had owned and conveyed it to him for a valuable consideration. * * * If it was the intention of the Legislature, in the clause of the act under consideration, to take from the husband a life estate, which had vested at the passage of the law, and give it to the wife, such intention was beyond their power of accomplishment. This is too well settled in American jurisprudence to need either discussion or the citation of authorities. This court held in *Russell* vs. *Rumsey*, decided at the Ottawa term, 1864, 35 Ill., 362, that a legislative enactment cannot take away even an inchoate right of dower. If, then, the language of the first clause of this act admitted of such a construction, as the counsel for appellant insists upon, such construction, as to the main object of the law, the vesting the title in the wife, could not be given to it without rendering this claim void." 38 Ill., 249–50; *Davenport* vs. *Karnes*, 70 Id., 467; *Almond* vs. *Bonnell*, 76 Id., 541; *Oglesby Coal Co.* vs. *Pasco*, 79 Id., 168.

In respect to statutes equivalent in effect to the one under consideration, the question arose in the State of New York, whether tenancy by the curtsey was thereby abolished, not retrospectively but prospectively, after the death of the wife. "After sundry conflicting decisisons, the law has become substantially settled, that while those acts excluded the husband during life from control of, or interference with, his wife's separate real or personal estate, and gave her alone the power of disposition by deed or will, yet they left the husband the right of curtesy in her real property, and of administration for his own benefit of her persoanlity, in so much as remained at her death undisposed of and unbequeathed." *Hatfield* vs. *Sneden*, 54 N. Y., 277; *Barnes* vs. *Underwood*, 47 *Id.*, 351; *Ransom* vs. *Nichols*, 22 *Id.*, 110;

Leach vs. *Leach*, 21 Hun., 382. Marvin, *J.*, uses this language: "I do not understand that the statutes of 1848 and 1849 exclude the husband beyond the life of the wife, or that they required or will justify us in holding that the legislature *intended* the heirs of the wife should take the estate immediately upon her decease, instead of her husband during his life. Such construction is also a forgetting or disregarding of the rule that the common law is not changed by a statute any further than a fair construction of the statute requires, and that a change or repeal by implication is not favored, * * I do not find such intention in the acts, and in my opinion, when all the facts requisite at common law to produce this tenancy exist, and the wife dies *intestate*, not having conveyed the land, the husband will take it for his life, to the exclusion of the heirs of the wife." *In the matter of Frances M. Winne*, 2 ~~Law~~., 32, 34. Lansing

A doctrine resting in part on the same basis, has been announced from the bench in Ohio, where, notwithstanding the statutes, in relation to the property of married women, which have in effect "put such property, during coverture, in the position of property limited by deed of trust to the sole and separate use of the wife," It has been held that "the husband's courtsy is not entirely, and in all cases destroyed, but exists as an estate contingent upon circumstances prescribed by the statutes. Therefore, the common law rule that a secret conveyance of her realty, by a woman under contemplation of marriage, is fraudulent and void against the husband, is not entirely destroyed by the statutes." *Westerman* vs. *Westerman*, 9 Am. L., R. U. S., 690. Jordan, J., said: "A conveyance of her property by the wife before marriage, pending a treaty of marriage, and in contemplation of marriage, and especially if done fraudulently as averred in this petition, ought to be set aside. *The husband's curtesy was such an interest as to make it a fraud upon him to convey it away. The statute of 1869*

is relied upon as taking away any interest in this property after his wife's death. I think the husband's curtesy was such a vested interest as to bring it within the rule, in *State, &c.* vs. *Commissioners, &c.*, 5 Ohio St., 497; id., 694."

It should be stated, however, that the Ohio act of 1866, in terms provides: "This act shall not affect the estate by the courtesy of any husband in the real property of his wife after her decease." 58 Ohio L., 54, which is qualified by the proviso in the act of 1869, "that if any deceased wife shall leave issue or legal representative of such issue by a former marriage, her surviving husband shall not be entitled to an estate by the curtesy in the interest, &c." 66 Ohio L., p. 21.

Keeping in view the established rule for the construction of statutes, "that the terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them," (*Hepburn* vs. *Griswold*, 8 Wall., 607.) It is respectfully submitted, that this court cannot give to § 727 of the Revised Statutes the construction claimed by the appellant, when there is another obvious construction, consonant with acknowledged principles of justice and equity. The construction claimed would make the statute retrospective; it would cause it to divest a citizen of his vested right, without due process of law; it would give to the law a meaning, which were it the legislative act of any State of this Union would be repugnant to that clause of the Constitution, which prohibits all laws impairing the obligation of contract. It would be a law to deprive the defendant John Hitz of a vested right acquired under a marriage contract, for what is esteemed in law a valuable consideration. In *Ogden* vs. *Saunders*, 12 Wheaton, 303, this court said: "Such laws" (ex post facto

laws and retrospective laws taking away vested rights) "are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle, adopted and sanctioned by the courts of justice in this country and in Great Britain, whenever such laws have come under consideration." In one of its earliest decisions, this court declared: "There are acts which the Federal or State legislature cannot do, without exceeding their authority * * eq. A law which punished a citizen for an innocent action, or, in other words, for an act, which when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers, and therefore, it cannot be presumed that they have done it. * * * To maintain that our Federal or State legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments. *Calder* vs. *Bull*, 3 Dallas, 388.

Very similar to this is the language of Chief Justice Marshall, twelve years afterwards:

> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative powers, and if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation."
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> *Fletcher* vs. *Peek*. 6 Cranch, 135.

It is true that in the legal-tender cases the opponents of

the act of Congress, then in controversy, maintained that it was an act which impaired the obligation of contracts, and for this reason, at variance with the spirit, if not the letter, of the Constitution; and this was the view insisted on by the dissenting minority. But the opinion of the majority of the court in referring to this point states its relation to the case as follows: "The argument assumes two things: *first*, that the acts do, in effect, impair the obligation of contracts, and, *second*, that Congress is prohibited from taking any action which may, *indirectly*, have that effect. Neither of these assumptions can be accepted." That is to say, in a case in which the majority of the court held that the act of Congress did not impair the obligation of contracts, the same majority were of opinion that Congress was not prohibited from taking action merely because it might "*indirectly*" have that effect. Even to this extent, such an act was vindicated by the majority of the court, on the express ground "that acts may be adopted to the exercise of lawful power and appropriate to it, in seasons of emergency, which would be inappropriate at other times." Such a justification, in the opinion of the majority of the court, was to be found in the fact "that a civil war was then raging, which seriously threatened the overthrow of the Government, and the destruction of the Constitution itself." (*Legal-Tender Cases*, pp. 548, 540.) The only qualification, therefore, to the doctrine, heretofore announced by this court, that retrospective laws taking away vested rights are contrary to the first principles of the social compact is the one arising, in the opinion of the majority of the court, from the exceptional crisis of a civil war, "which seriously threatened the overthrow of the Government, and the destruction of the Constitution."

This is the *ultima ratio* of government, the "wild justice" of war; the state of affairs arising, not *inter leges*, but *inter*

arma, not the voice, but the silence of the law. No such crisis existed to demand, nor could have demanded if existing, § 727, which became the law of this District in 1869. It is therefore submitted, 1st, that this law does not admit of the construction claimed by the appellant, and 2d, that it would not be valid if it did.

It remains to examine the position taken by the appellant, that prior to the recovery of the judgment relied on in the bill, Hitz and wife had united in a conveyance of their entire interest of the land in controversy to Metzerott & Cross, as trustees. This deed, it is true, bears date on Dec. 9th, 1878, which was before the judgment, but it was not received for record until May 13th, 1879, which was after the judgment. The statute governing this subject (of April 27th, 1878) provides that "all deeds of trust, mortgages, &c., and any instrument of writing which, by law, is entitled to be recorded in the office, &c., shall take effect and be valid as to creditors, and as to subsequent purchasers for consideration without notice, from the time when such deed of trust, &c., shall, after having been acknowledged, approved, or certified, as the case may be, be delivered to the recorder of deeds for record, and from that time only; and the recorder of deeds shall note on each deed, &c., the day and hour when the same shall be received." It follows that from May 13th, 1879, and from that time only, could this deed be of any validity or effect against creditors without notice. *McCoy* vs. *Rhodes*, 11 How., 140; *Taylor* vs. *Doe*, 13 Id., 293.

In addition, it is in proof that it was not intended that this deed should be placed on record, until the indebtedness of John Hitz to the German-American National Bank should be adjusted, (which condition would have postponed the recording beyond the time when it was actually admitted to record), and that the deed was withheld from the record by the express advice of the counsel of Mr. Hitz, for the purpose of preventing notice of its execution. (Rec., pp. 30, 31.)

Because of the breach of this condition, the grantees in this deed of trust filed a "caveat against the recordation of said deed," stating "that said grantees have not yet accepted of the said trusts contained in said deed for the reason that the grantor, John Hitz, has totally failed to perform the agreement or contract on his part, which was the cause and inducement of executing said deed." (Rec., p. 27.)

It is not uot unreasonable to say that this alleged deed has never been made at all. The delivery of a deed is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. None of these conditions obtain. The trusts of this deed have never been rightly and truly accepted. They were accepted, if at all, exclusively upon conditions which have not been complied with; but on the contrary, have been violated; wherefore the same record which exhibits the registration, exhibits the protest against it. The usual presumptions of such a record are repelled by the attendant and subsequent circumstances. It would be in entire accord with its own previous rulings for this court to hold that this deed never had been made. *Young* vs. *Guilbeau*, 3 Wall., 641; *Parmelee* vs. *Simpson*, 5 *Id.*, 86. The making of a deed to one as trustee does not vest the trustee with title, if he never in any form accept the trust; and to show that the trustee did not accept it, a declaration, not under seal, but signed by him nine years after the deed, has been considered proper evidence to show the fact. *Armstrong* v. *Morrill*, 14 ~~Dall.~~ Wall., 120; *Adams* v. *Adams*, 21 id., 185. A disclaimer will take effect as of the time of the gift, and will prevent the estate from vesting in the trustee disclaiming. Perry on Trusts, p. 267.

It can hardly be necessary to consider the further argument based on the alleged prior disclaimer by Hitz of all interest in the real estate of his wife, and that the deed as the expression of this antecedent purpose though unrecorded,

should be sustained as a settlement by the husband upon the wife, upon valuable consideration. It is sufficient to refer to what is said on this point in the opinion of the Court in General Term. There is no evidence, save a statement of what existed in his own mind, of any purpose upon the part of Hitz, before the execution of the deed of trust, to disclaim or abandon his rights in the real estate as husband. Moreover such a purpose could not have been legally effected by him by disclaimer even in writing.

In 1st Washburne on Real Property (128,) it is said: "This right initiate, as well as the estate consummate is liable to be taken for his debts, nor can he defeat the right by any disclaimer of his right of curtesy." In *Watson* vs. *Watson*, the court said: "Does tenant by the curtesy stand as heir or as purchaser? It is an estate thrown upon the tenant by the curtesy by operation of law. It partakes rather of the character of an estate acquired by descent. Like the heir he cannot by refusing to take it, cause it to remain in the wife, nor can he by disclaimer transfer it to others. The estate thus vested in him becomes immediately liable for his debts, and he cannot by any refusal to take the property, defeat the claims of his creditors." 13 Conn., 83. As to the different consideration alleged, see *Sewell* vs. *Baxter*, 3 Md. Ch., Dec., 454; *Mayfield* vs. *Gilman*, 31 Md., 240.

This alleged deed then is, rightly speaking, no deed at all; since it never was truly delivered, and the trusts under it were not accepted, but disclaimed. But if the deed had been truly delivered, and if the trusts had been actually accepted, the deed would have been fraudulent and void against creditors.

The deed which was intended to protect the wife's property against the husband's subsequent debts, was used and put on record to defeat an existing indebtedness, and to protect her property from an existing judgment.

At the time it was made, the defendant, John Hitz, had no real or personal property, although he was largely in debt to the plaintiff and to others. It should be set aside therefore, and the property described in the bill subjected to the execution. Herman on executions, § 134; *Vanduzen* vs. *Vanduzen*, 6th Paige, Ch. 366.

R. K. ELLIOT,
LEIGH ROBINSON.